

**BEFORE the HEARING EXAMINER of the  
CITY of LAKE FOREST PARK**

**DECISION  
REVISED AFTER RECONSIDERATION <sup>1</sup>**

FILE NUMBERS: CU07-01, SA07-162, and SSD07-04

APPLICANT: King County, through its Facilities Management Division and its Parks and Recreation Division

TYPE OF CASE: Consolidated Conditional Use Permit, Environmentally Sensitive Areas Public Agency and Utility Exception, and Shoreline Management Act of 1971 Substantial Development Permit, all for redevelopment of the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park

STAFF RECOMMENDATION: Approve all three permits subject to conditions

SUMMARY OF DECISION: REMAND elements of the requested PAUE determined not to be subject to a PAUE; GRANT all other requests subject to consolidated conditions

DATE OF REVISED DECISION: April 8, 2009 <sup>2</sup>

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<sup>1</sup> This is a complete re-issuance of the Decision, incorporating revisions resulting from the reconsideration process. Revisions made through the reconsideration process are denoted by footnotes; revisions to existing footnotes are denoted by parenthetical notations at the end of the footnote. Whenever a Finding, Conclusion, or Condition is inserted or deleted, all subsequent Findings, Conclusions, or Conditions within that section have been renumbered accordingly. The “header” on all pages has also been revised; that revision is not footnoted.

<sup>2</sup> Line revised after reconsideration.

## INTRODUCTION

King County, through its Facilities Management Division and its Parks and Recreation Division (King County), 201 S Jackson Street, Suite 700, Seattle, Washington 98104, filed a Conditional Use Permit (CUP) application (Exhibit 9 <sup>3</sup>), an Environmentally Sensitive Areas (EnvSA <sup>4</sup>) Public Agency and Utility Exception (PAUE) application (Exhibit 34), and a Shoreline Management Act of 1971 (SMA) Substantial Development Permit (SSDP) application (Exhibit 14), all for redevelopment of the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park. The applications were filed pursuant to Chapter 16.26 Lake Forest Park Municipal Code (LFPMC) on: October 11, 2007; October 1, 2008; and November 20, 2007, respectively. (*Id.*, respectively, and Exhibit 129-10, answers to Questions 1 and 2) The Lake Forest Park Planning Department (Planning) deemed the applications to be complete on: December 4, 2007 (Exhibit 71); November 19, 2008 (Exhibit 129-10, answer to Question 1); and, December 18, 2007 (Exhibit 129-10, answer to Question 2), respectively.

The subject property is a linear corridor located between NE 145<sup>th</sup> Street and Log Boom Park along an east facing slope above the western shore of Lake Washington. <sup>5</sup>

The Lake Forest Park Hearing Examiner (Examiner) viewed the subject property on January 7 and 16, 2009.

The Examiner convened a consolidated open record hearing at 6:00 p.m. on January 21, 2009, Day 119 of the 120 day decision-making period established by LFPMC 16.26.040(F)(1). <sup>6</sup> (Exhibit 129-10, answer to

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<sup>3</sup> Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

<sup>4</sup> "ESA" might seem to be a more logical acronym for "Environmentally Sensitive Areas." However, the acronym ESA is commonly used to refer to the Federal Endangered Species Act. In order to avoid confusion and/or misunderstanding, the Examiner has coined the acronym "EnvSA."

<sup>5</sup> As Exhibit 30 quite correctly notes, "The orientation of the Burke-Gilman [T]rail within the redevelopment area varies from roughly north-south to approximately east-west making the description of site features relative to cardinal directions confusing." (Exhibit 30, p. 1)

The Examiner will employ two methods of directional reference in this Decision. Project Stationing (a method used by engineers and surveyors to denote centerline linear distances on plans) begins at Station 0+00 near NE 145<sup>th</sup> Street and ends at Station 104+40 at Log Boom Park. (Exhibit 6) Like the authors of Exhibit 30, the Examiner may orient "site features in terms of [T]rail Station number and the feature's location right [on the Lake Washington side of the Trail], center, or left [away from Lake Washington] of the [T]rail alignment looking upstation." (*Id.*)

The Examiner may also use the directional convention used in the project's Final Environmental Impact Statement (FEIS): The entire Trail will be assumed to lie in a north-south direction and have west (upland) and east (lakeward) sides. (Exhibit 22, p. 1-15) Using that convention, NE 145<sup>th</sup> Street is at the south end of the Trail, Log Boom Park is at the north end of the Trail, Lake Washington is east of the Trail, and SR 522 is west of the Trail.

<sup>6</sup> The hearing was initially scheduled for January 15, 2009, but had to be rescheduled to correct a public notice defect. (Exhibits 63 and 97 and official notice)

Question 3) Planning gave notice of the hearing as required by the LFPMC. (Exhibit 97) The hearing was not able to be completed that evening. The Examiner continued it to and concluded it on the evening of January 26, 2009.<sup>7</sup>

Testimony under oath was presented by:

Tim Ahern	Gina Auld
Carolyn Pauw Barden	Steve Bennett
David Bilski	Kenny Booth
Carl Cook	Jennifer Creveling
Charles Douglas	Ronald Fasano
Nancy Garbman	Tyson Greer
Jim Halliday	Brad Hanson
Jason Henry	Linus Kamb
Robert King	Victor Kress
Ken Nilsen	Melanie Paquin
Dean Peterson	Mark Phillips
Steven Plusch	Michael Read
Terry Reckord	Chris Rule
Skye Schell	Barbara Sharkey
John Skamser	Carl Stixrood
Stuart Strand	Chad Trabant
Donovan Tracy	Brian Vanderburg
Bill VanHorn	Tim Walsh
Mark Withers	

Argument (unsworn) was presented by the following attorneys at law:

Jeffrey Eustis, for Cascade Bicycle Club	Andrew Marcuse, for King County
Bob Sterbank, for Lake Forest Park	

Exhibits 1 – 127<sup>8</sup> were offered and admitted during the hearing, a list of which is maintained by the Hearing Clerk.

The Hearing Examiner held the hearing record open for submittal of written closing statements and associated materials. Exhibits 128 – 131 were submitted through that process. At the implied request of the City, the Examiner, acting pursuant to Hearing Examiner Rule of Procedure (RoP) 104, ¶ 2, allowed

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<sup>7</sup> The Examiner announced the date, time, and place of the continuance on the record during the initial hearing session. Therefore, formal written notice was not required.

<sup>8</sup> A few exhibits are duplicates; Exhibit number 72 was not used.

submittal by E-mail of a brief Response and Sur-Response to the closing arguments by the City and King County, respectively. Those documents are entered as a single E-mail string as Exhibit 132. The hearing record closed on February 18, 2009.

King County agreed pursuant to LFPMP 16.26.040(F)(2)(d) to extend the 120 day decision-making period to the end of the hearing process.<sup>9</sup> (Exhibit 128, answer to Question 4 and statement of counsel)

On February 24, 2009, the Examiner issued a Decision which Remanded elements of the requested PAUE determined not to be subject to a PAUE and Granted all other requests subject to consolidated conditions. (Exhibit 133) Two parties of record filed timely Requests for Reconsideration: Bob Wagar (Wagar) (Exhibit 134) and King County (Exhibit 135).<sup>10</sup>

The Examiner accepted both Requests for Reconsideration and invited parties of record, especially the City Engineer, Wagar, and King County, to submit written comments not later than March 24, 2009. (Exhibit 136) On March 18, 2009, the City requested a one week extension of the comment deadline because “the City Engineer has not been involved in reviewing the CUP and other applications for the Burke-Gilman Trail”. (Exhibit 139) The Examiner extended the comment period for the City and also for King County, ultimately to not later than April 3, 2009. (Exhibits 140, 148, and 149) Substantive written comments submitted during the Reconsideration process are marked as Exhibits 137, 138, 142 – 147, and 150 – 156; together they total over 200 pages. The Hearing Clerk has a complete list of all hearing and Reconsideration exhibits.<sup>11</sup>

This Revised Decision incorporates revisions as deemed appropriate to respond to all items within the two Requests for Reconsideration.<sup>12</sup>

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

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<sup>9</sup> During the hearing process the Examiner asked King County if it would grant him up to 15 days after the close of the record in which to issue this Decision. (Exhibit 112, Question 5) The Examiner stated at the close of the hearing that he would not need more than 10 days after the close of the record.

<sup>10</sup> Paragraph added after reconsideration.

<sup>11</sup> Paragraph added after reconsideration.

<sup>12</sup> Paragraph added after reconsideration.

## RULINGS<sup>13</sup>

### A. Consideration of Cost

**Request:** At an early point during King County’s presentation of its case in chief, Lake Forest Park asked the Examiner to rule on the following question: Can costs associated with required mitigation measures make an Essential Public Facility (EPF) impracticable?<sup>14</sup>

The Examiner requested brief oral argument from Lake Forest Park and King County. Lake Forest Park argued that *City of Des Moines v. Puget Sound Regional Council* [188 Wn. App. 836, 988 P.2d 27 (1999)] resolved the question when it held that “the Cities are correct that the Port [of Seattle] will have to comply with the Cities’ reasonable permitting and mitigation requirements. The fact that these requirements may make the expansion [of Sea-Tac International Airport] more costly does not relieve the Port of these obligations.” [Des Moines at 843]

King County responded that the Des Moines court suggests, without specificity, that a threshold exists beyond which mitigation costs would make an EPF impracticable. It further noted that “impracticable” is not clearly defined in the case. Finally, it indicated that it desired to submit sufficient evidence to preserve the issue for potential appeal.

Lake Forest Park replied that the Examiner has no obligation to allow submittal of full evidence on an inappropriate issue.

**Ruling:** The Examiner orally held that Des Moines is the controlling law on the issue. In addition to the sentence quoted above, the Des Moines court stated that “After consistency [between an adopted regional Transportation Plan (RTP) and a local comprehensive plan] is achieved, the Port will have a duty to comply with both the RTP and the local plans, regardless of whether they require mitigation which the Port finds either difficult or expensive.”<sup>7</sup> [At 31. Footnote 7 in the decision reads: “As urged by the Port in its motion for reconsideration/clarification, we clarify that these duties are limited to Port proposals for specific projects within local jurisdictions in accordance with state and federal law.”]

The Examiner ruled, based upon Des Moines, that King County could not argue that mitigation costs alone would make the proposal impracticable. Further, the Examiner stated that King County would not be allowed to present extensive evidence on the point.<sup>15</sup>

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<sup>13</sup> Title made plural, section reformatted, and subsections B and C added after reconsideration.

<sup>14</sup> Question paraphrased by the Examiner.

<sup>15</sup> The Examiner notes that King County’s pre-hearing brief and some of its attachments contain argument and evidence on this issue. (Exhibit 86) Those materials were admitted to the record before Lake Forest Park requested the ruling.

B. Strike Declaration of Terry Reckord

**Request:** As part of its Response to Requests for Reconsideration, the City asked the Examiner to strike the Declaration of Terry Reckord (Reckord Declaration) on the basis that it is “inadmissible hearsay, lacking foundation, and irrelevant to the legal issues before the Examiner.” (Exhibit 152, pp. 17 and 18, quote on p. 17 at ll. 20 & 21) The Reckord Declaration was part of King County’s Request for Reconsideration. (Exhibit 135.1)

**Ruling:** The City’s request is DENIED. The Examiner acknowledges that the Reckord Declaration contains hearsay; admission of hearsay is permissible in quasi-judicial proceedings. The Examiner carefully considers the weight to be accorded any hearsay in every case he hears. The Examiner also recognizes that Mr. Reckord is not a licensed civil engineer; he is a registered landscape architect. (Exhibit 135.1, p. 1, § 2) His opinions on the meaning of traffic engineering matters will not, therefore, be accorded as much weight as the opinions of the professional traffic engineers who have participated in these proceedings.

C. Strike Declaration of Michael Read or Allow Opportunity for City Response

**Request:** In a post-reconsideration comment period submittal, the City asked the Examiner to strike the Declaration of Michael Read (Read Declaration) or, in the alternative, allow the City an opportunity to respond to it on the basis that it “offer[s] a pre-emptive reply to the City’s response [to the Requests for Reconsideration] rather than Mr. Wagar’s reply [to King County’s Request for Reconsideration].” (Exhibit 156, Sterbank to Galt E-mail, April 3, 2009, at 5:41 p.m., ¶ 5) The Read Declaration (Exhibit 151) was submitted by King County with its comments on Wagar’s Request for Reconsideration (Exhibit 150).

**Ruling:** The Examiner DENIED both requests by E-mail sent April 4, 2009, at 10:37 a.m. The Examiner allowed the Read Declaration to become part of the record and concluded that he did “not need additional briefing or response regarding the content of Exhibit 151.” (Exhibit 156, Galt to parties E-mail, April 4, 2009, at 10:37 a.m., ¶ 1) The Wagar Request for Reconsideration, while focusing on one main issue (Condition 9 regarding a reduced speed limit on a portion of the Trail), is wide ranging and touches on many different topics. The Read Declaration, while perhaps intended in part to preemptively respond to the City’s response (King County filed its response materials before the City filed its), addresses issues upon which Wagar touched. It is simply not worth trying to sort out which paragraphs go beyond the scope of Wagar’s Request for Reconsideration.

## ISSUES

Does the application meet the criteria for CUP, PAUE, and SSDP approval as established within the LFPMC?

The major substantive areas of controversy are: Proposed changes to the trail's drainage pattern and traffic control plan; wetland impact and mitigation; and tree removal. King County asserts that it does not need a PAUE for all the subject areas which Lake Forest Park says it does.

## **FINDINGS OF FACT**

### **A. Overview**

- A.1. The Burke-Gilman Trail is a shared-use path which is part of King County's regional trail system. The Burke-Gilman Trail was constructed in 1977 on a former railroad track bed. The Burke-Gilman Trail technically begins at NE 145th Street at the southern edge of Lake Forest Park and ends in Bothell at Blyth Park, although a southern extension in Seattle goes through Gas Works Park to Shilshole (a total distance of about 18 miles including the Lake Forest Park segment), and eastern extensions continue on to Redmond, Lake Sammamish, and beyond. (Exhibits: 1; and 22, pp. 1-1 – 1-7 and 2-5; and testimony)

King County proposes to rehabilitate the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park. The project extends from the southern City limit at NE 145th Street to the east City limit at Log Boom Park.

The primary need for the project is to improve safety and ease of use along the trail. This need is driven by several factors, including: 1) need to address trail surface irregularities; 2) need to meet minimum trail standards; 3) need to create uniformity along the trail; 4) need to accommodate an increasing number of trail users; and 5) need to accommodate the range of users in a safe manner,

(Exhibit 22, p. 1-7)

The term "Burke-Gilman Trail" or simply the "Trail" when used hereinafter refers to that portion of the Burke-Gilman Trail within Lake Forest Park unless expressly indicated otherwise. (Exhibit 86K-6, Slide 1)

In summary, the rehabilitation will:

- A. Resurface and widen the trail from 10 feet to 12 feet with a three foot shoulder on the east side of the trail and a one foot shoulder on the west side of the trail (the shoulders would be a soft surface made of stabilized crushed rock). An additional one foot clearance from the top of slope or ditch at the outer edges of either side of the trail's new shoulders will be provided to stabilize the trail's edges, for a total developed trail width of 18 feet.
- B. Change the trail's cross-slope from neutral or west sloping to east sloping.

- C. Improve upslope drainage ditches; install new culverts and/or modify existing culverts.
  - D. Revise traffic controls and signage to provide priority for trail users at most intersections between the trail and public and private roadways and driveways. Remove all existing chicanes in the trail.<sup>16</sup>
  - E. Remove obstacles, vegetation, and fencing to improve sight distance at crossings.
  - F. Replace vegetation.
  - G. Replace the pedestrian bridge over Lyon Creek with a wider, longer structure.
  - H. Replace and install new trail amenities (lighting, benches, waste receptacles. etc.)
- A.2. Both the Findings of Fact and the Conclusions of Law in this Decision are arranged topically, although the topics are not entirely parallel. The Findings of Fact begin with this overview section which is followed by sections addressing the major aspects of the proposal: Widening; cross slope and drainage; traffic controls; vegetation removal; wetlands and streams; and trail amenities. The Findings of Fact conclude with a section addressing the City's recommendations, King County's response to those recommendations, and public comment.
- The Conclusions of Law start with a summary section which also addresses legal issues. Sections paralleling the core sections in the Findings of Fact, both in terms of topic and outline identifier, come next followed by sections addressing compliance with approval criteria for each of the three permits covered by this Decision. The Conclusions of Law conclude with an analysis of the recommended conditions.
- A.3 The Cascade Bicycle Club (CBC) appealed adoption of Lake Forest Park Ordinance No. 951, which amended LFPMC 18.54.047(C) regarding criteria and standards for issuance of CUPs for multi-purpose trails, to the Central Puget Sound Growth Management Hearings Board (CPSGMHB). In a decision which was not appealed, the CPSGMHB ruled that the Burke-Gilman Trail is a regional EPF under the Growth Management Act (GMA), Chapter 36.70A RCW, and declared Ordinance No. 951 to be invalid. (Exhibits: 57, p. 4; and 87, p. 2) The CPSGMHB ruled that the CUP process may be appropriate for a local jurisdiction's determination of reasonable conditions and mitigation measures, but a CUP process cannot be used to deny a permit for a state or regional EPF. [*Cascade Bicycle et al. v. City of Lake Forest Park (Cascade Bicycle)*, CPSGMHB Case No 07-3-0010c, Final Decision and Order, July 23, 2007]

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<sup>16</sup> A "chicane" is a sharp zigzag section designed to force the traveler to slow down. Exhibit 86K-6, p. 3, bottom photograph depicts one of the chicanes on the Trail.



On or about March 10, 2008, the CPSGMHB issued an Order Finding Compliance in *Cascade Bicycle* which held that LFPMC 18.54.047(C), as it existed prior to the enactment of Ordinance No. 951, complied with GMA requirements. (Exhibit 87 or 129-1)

- A.4. King County issued a State Environmental Policy Act (SEPA) Determination of Significance (DS) for the Burke-Gilman Trail Redevelopment project on or about February 22, 2007.<sup>17</sup> (Exhibit 11B) King County issued a Draft Environmental Impact Statement (Draft EIS) in November, 2007. (Exhibit 64) King County issued the Final EIS (FEIS) in June, 2008. (Exhibit 22)

The FEIS lists numerous mitigation measures. (Exhibit 22, Chapter 3) King County has incorporated some of the listed mitigation measures into the proposal. It suggests that others

could be incorporated into the proposal without fundamentally altering it. However, [King County's position is that] some of the measures that are listed in the FEIS could not be implemented without substantially altering the proposal and thus running afoul of the CPSGMHB EPF decision, Exhibit 86K-1.

(Exhibit 128, p. 2, answer to Question 6, underlining in original)

King County published a Notice of Action for the Burke-Gilman Trail Redevelopment project and its FEIS on July 2, 2008. (Exhibit 86K-2.7) The Notice of Action adopted the preferred alternative as described within the FEIS (the proposal as presented herein for approval) and stated that the deadline to appeal that action or the FEIS for that action was August 1, 2008. (Exhibit 83)

No appeal of the action or the FEIS was filed. (Exhibits: 57, p. 4, ¶ 2; and 86K-2, p. 5, ¶ 16)

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<sup>17</sup> Under State regulations, the "lead agency" is the governmental entity "with main responsibility for complying with SEPA's procedural requirements". [WAC 197-11-050(2)] The lead agency under SEPA is normally the governmental entity which receives a permit application from an applicant. [WAC 197-11-924(1)] Under that general rule, the City would be the lead agency for all three of the permits sought here. However, a special rule applies to governmental projects: "When an agency initiates a proposal, it is the lead agency for that proposal." [WAC 197-11-926(1)] King County is thus the lead agency for the Trail redevelopment proposal.

When Footnote 16 in Exhibit 130 states that "the City is relying on the County's FEIS and has incorporated it by reference as contemplated by WAC 197-11-635", it is somewhat misstating the applicable rule. Section 197-11-635 WAC provides guidance on how studies and materials may be "incorporated by reference" into the SEPA process by a lead agency. "'Incorporation by reference,' [is] where an agency preparing an environmental document includes all or part of an existing document by reference." [WAC 197-11-600(4)(b), emphasis added] An "agency acting on the same proposal shall use an environmental document unchanged" unless certain limited conditions apply. [WAC 197-11-600(3)] Finally, "Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document". [WAC 197-11-600(4)(a)] Essentially, the City was required by law to accept and use King County's FEIS.

- A.5. No Federal, State, or local regulations specifically address the design of shared use paths. Several respected guideline documents exist in the public domain, have been relied upon by King County and the City, and have been made available for use by the Examiner in preparation of this Decision:
- A. American Association of State Highway and Transportation Officials (AASHTO) “Guide for the Development of Bicycle Facilities,” 1999 (1999 AASHTO Bicycle Guide). The 1999 AASHTO Bicycle Guide covers the entire range of bicycle facilities. The “Design” chapter includes a specific section on shared use path design. [1999 AASHTO Bicycle Guide, Chapter 2, pp. 33 – 59] The 1999 AASHTO Bicycle Guide “is not intended to set forth strict standards, but, rather, to present sound guidelines that will be valuable in attaining good design ...”. [1999 AASHTO Bicycle Guide, p. 2]
  - B. AASHTO “A Policy on Geometric Design of Highways and Streets,” 2004 (2004 AASHTO Green Book <sup>18</sup>) The 2004 AASHTO Green Book “provide[s] guidance to the designer by referencing a recommended range of values for critical dimensions. It is not intended to be a detailed design manual ....” [2004 AASHTO Green Book, p. xliii, ¶ 4] The 2004 AASHTO Green Book “is not intended as a policy for resurfacing, restoration, or rehabilitation (3R) projects.” [2004 AASHTO Green Book, p. xliii, ¶ 3] The 2004 AASHTO Green Book includes chapters for multiple types of rural and urban streets, from freeways to local access streets. Those chapters which include sections on bicycle facilities defer (not unexpectedly) to the 1999 AASHTO Bicycle Guide. (For example: Chapter 2, p. 100; Chapter 4, p. 367; Chapter 5, pp. 389 and 404; Chapter 7, p. 496.) Therefore, the 2004 AASHTO Green Book has very little relevance.
  - C. Rails-to-Trails Conservancy “Trails for the Twenty-First Century,” Second Edition (Rails-to-Trails Guide). The Rails-to-Trails Guide provides only general guidance. (Exhibit 128K-4)
  - D. Washington State Department of Transportation “Design Manual,” 2006 (2006 WSDOT Design Manual). Chapter 1020 of the 2006 WSDOT Design Manual covers “Bicycle Facilities.” “This chapter is to serve as a guide. ... These guidelines apply to normal situations encountered during project development.” (Exhibit 128K-3, p. 1020-1)
  - C. King County “Regional Trail Inventory and Implementation Guidelines,” July, 2004 (2004 King County Guidelines) This document includes a chapter on “Trail Development” which contains the County’s “Shared Use Trail Policy” and guidelines for trail surfacing, facilities,

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One professional engineer, writing on his own behalf, questioned why the Examiner requested “copies of AASHTO 1999 Guidelines” (See Exhibit 112, Question 9.) when both 2001 and 2004 versions of the AASHTO Green Book were available. (Exhibit 115, p. 1) The answer is that the Examiner was requesting a copy of the 1999 AASHTO Bicycle Guide, not the latest version of the AASHTO Green Book. Copies of both documents have been made available to the Examiner by the principal parties for use in preparation of this Decision.

and maintenance. (Exhibit 1, Chapter 3) King County bases its trail designs on the 1999 AASHTO Bicycle Guidelines. (Exhibit 1, p. 22)

A.6. Regulations do exist for certain elements associated with the Burke-Gilman Trail:

A. The Federal Highway Administration “Manual on Uniform Traffic Control Devices,” 2003 (MUTCD) is the national standard for application of traffic control devices. It contains “standards” and “guidance” regarding the use of all types of traffic devices. A “standard” is “a statement of required, mandatory, or specifically prohibitive practice”. [MUTCD, p. I-1] “Guidance” is “a statement or recommended, but not mandatory, practice in typical situations, with deviations allowed [where warranted by] engineering judgment or engineering study”. [MUTCD, p. I-3] Part 9 of the MUTCD addresses “Traffic Controls for Bicycle Facilities.”

B. King County 2005 Surface Water Design Manual (2005 Design Manual).<sup>19</sup> The 2005 Design Manual contains specific, detailed requirements for handling and treating stormwater runoff.

Lake Forest Park has adopted the 2005 Design Manual for use in the City. [LFPMC 16.24.010(B)] The requirements of Chapter 16.24 LFPMC, Drainage Plans, apply to municipal corporations undertaking projects within the City which require issuance of SSDPs or CUPs. [LFPMC 16.24.040(A)(3) and .050(A)] The entire City is “within the conservation flow control area”. [LFPMC 16.24.170(B)]

C. Washington Model Traffic Ordinance (MTO). Lake Forest Park has adopted the MTO, with some alterations. [Chapter 10.04 LFPMC] Lake Forest Park has designated the City Director of Public Works as its traffic engineer for all purposes under the MTO. [LFPMC 10.04.090(A)] The MTO is codified at Chapter 308-330 WAC.

D. King County has adopted trail use regulations which are codified at King County Code (KCC) 7.12.295.

A.7. The entire Trail right-of-way through Lake Forest Park is designated Recreation/Open Spaces on the City’s adopted Comprehensive Plan. (Exhibit 57)

A.8. The Trail right-of-way is zoned RS-7.2, a basically single-family residential zone. (Exhibit 57<sup>20</sup>; Chapter 18.22 LFPMC) All Conditional Uses listed in Chapter 18.54 LFPMC are allowed, subject to issuance of a CUP, in the RS-7.2 zone. [LFPMC 18.22.020] “A multi-use or multi-purpose trail

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<sup>19</sup> The King County 2005 Surface Water Design Manual is also sometimes referred to by the acronym “KCSWDM.”  
<sup>20</sup> Exhibit 57 lists the zone name as “RS-7200”. (Exhibit 57, p. 1) The technically correct name, according to Chapter 18.22 LFPMC, is “RS-7.2”. The Examiner elects to use the technically correct name.

facility” is allowed in all zones. [LFPMC 18.54.047] Special considerations associated with such a use are found in that code section and are quoted in the “Legal Framework; Review Criteria” section of this decision, below.

- A.9. Lake Washington is a Shoreline of Statewide Significance under the Shoreline Management Act of 1971. [Chapter 90.58 RCW] Approximately 1.33 miles of the Trail lies within 200 feet of Lake Washington’s ordinary high water mark and is thus within the SMA’s jurisdictional area: The southern 0.98 miles of the trail extending north approximately to NE 165<sup>th</sup> Street; and 0.35 miles of the Trail north of Ballinger Way NE. (Exhibit 28) The portion of the Trail right-of-way within the SMA jurisdictional area and the entire Lake Washington shoreline within Lake Forest Park are designated as an Urban Environment under the King County Shoreline Master Program (KCSMP).<sup>21</sup> Public pedestrian and bicycle pathways are an allowed use within the shoreline Urban Environment. (Exhibit 59)
- A.10. An SSDP was issued by King County on June 23, 1975 for construction of the current Burke-Gilman Trail. (Exhibit 59, p. 2)
- A.11. In a case with as voluminous a file as exists in this case (a “banker’s box” of exhibits), with as many interested citizens as participated in this case, with as many disparate opinions and issues as arose in this case, and with as much institutional tension as exists between King County and the City in this case,<sup>22</sup> it would be all too easy to succumb to the notion that every single point of concern or dispute must be addressed in order to make the decision process complete.

The Examiner declines to take that approach. Rather, this Decision will focus on those issues necessary to show compliance (or lack thereof) with established permit approval criteria. If the Decision does not address a concern raised by a hearing participant, it is because the Examiner has concluded that that issue or argument is not relevant to the decisions which must be made in this proceeding.

- A.12. The Findings of Fact and Conclusions of Law in this Decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the Decision as a whole.
- A.13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

B. Widening

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<sup>21</sup> The City adopted the KCSMP and the implementing portions of the King County Code (KCC), Title 25, when it annexed the area in which the subject site is located. While the City is in the process of obtaining state approval of its own SMP, it still uses the KCSMP and Title 25 KCC.

<sup>22</sup> See, for example, Exhibits 129, 130, and 132.

- B.1. Approximately the southern ¼ mile of the Trail right-of-way (From Sta. 0+00 to approximately Sta. 13+75) is 100 feet wide; the remainder is generally 50 feet wide. (Exhibit 27)
- B.2. The Trail is situated on an 11 - 18 foot wide former railbed. (Exhibit 30, p. 2) Based upon the width of the former railbed, it can be safely presumed that it was built to accommodate a single track line. (Exhibits 27, 86K-5, and 86K-6)
- B.3. The Trail right-of-way follows a near zero gradient, side-slope alignment roughly paralleling the Lake Washington shoreline. The original track bed was cut into the side slopes. Steep uphill slopes exceeding 40% and 10 feet in vertical elevation change exist along the west side of the Trail between approximately Sta. 0+00 - 56+00 and again between approximately Sta. 84+00 - 104+40. Steep downhill slopes of generally 10 feet or less exist on the east side of the Trail between approximately Sta. 0+00 - 50+00 and again between Sta. 84+00 - 104+40. Approximately 13 and 42 retaining walls are presently located on the west and east sides of the Trail, respectively. A relatively narrow and flat strip of land lies between the Trail right-of-way and Lake Washington. For much of the Trail's length, access roads and a single row of single-family residences occupy that strip of land fronting on the Lake Washington shoreline. (Exhibits: 4, p. 7: Drainage Basins Map; 22, Fig. 1-1; 27; 30; and 86K-6)
- B.4. The Trail today is an asphalt paved surface nominally 10 feet wide. Grass and dirt shoulders, typically about two feet wide, border the paved surface. (Exhibits 22, 86K-5, 86K-6, and 104)
- B.5. Trail use was counted on two week days and one Saturday in the first week of June, 2004.<sup>23</sup> Total trail users during the 12 hours counted on each of those days ranged from 1,262 to 1,496, with the highest volume occurring on Saturday. Week day peak hour use occurred in the afternoon commute time with between 209 and 237 users counted; Saturday peak use occurred around the noon hour with 196 users counted. Seventy-seven to 85 % of the users counted were bicyclists, with 12% - 16% pedestrians and 1% - 2% skaters. (Exhibit 22, p. 3.11-3, Table 3.11-1)
- B.6. The 1999 AASHTO Bicycle Guide recommends that two-way shared use paths have a paved width of 10 feet or 12 feet if there is "substantial use by bicycles, joggers, skaters and pedestrians". [1999 AASHTO Bicycle Guide, pp. 35 & 36, quote from p. 36) A shared use path should have two foot wide shoulders on both sides and a clear zone of at least three feet on each side of the pavement which is free of any obstructions, including sign poles. A path adjacent to an embankment should have a wider separation or "a physical barrier, such as dense shrubbery, railing or chain link fence". [*Op. cit.*, p. 36]

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<sup>23</sup> The 2004 King County Guidelines mention a "1990 survey" of Trail use which indicated "close to 3000 users on a peak day and over 1500 on a weekday." (Exhibit 1, p. 23, ¶ 3) That survey was not mentioned or relied upon in the FEIS. (Exhibit 22, pp. 3.11-2 and 3.11-3, § 3.11.2.4) The Examiner elects to rely on the more recent user count as reported in the FEIS.

The 2006 WSDOT Design Manual recommends that shared use path width be 12 feet, with 10 feet as the minimum acceptable; 12 – 14 foot paved width is recommended “when there will be substantial use by bicyclists, or joggers, skaters, and pedestrians.” [2006 WSDOT Design Manual, p. 1020-3, § 1020.06(1), ¶ 1] Minimum recommended horizontal clearance between pavement edge and obstructions “is at least 2 feet.” [*Op. cit.*, p. 1020-3, § 1020.06(2), ¶ 1] Like the 1999 AASHTO Bicycle Guide, the 2006 WSDOT Design Manual recommends either a five foot separation or a physical barrier when a trail is adjacent to an embankment. [*Op. cit.*, p. 1020-3, § 1020.06(2), ¶ 2]

The 2004 King County Guideline recommends a 12 foot hard surface with two foot shoulders on each side for trails expected to handle more than 2,000 users per day and a 10 foot wide surface for more lightly used trails. King County also recommends a separated pedestrian facility wherever possible. (Exhibit 1, pp. 23 & 24)

- B.7. Chapter 16.16 LFPMC includes regulations regarding activities on erosion, landslide, seismic, and steep slope hazard areas. Virtually the entire Trail passes through or abuts one or more of those areas. (Exhibits 25, 30, and 66) Erosion hazard areas generally require heightened care during construction. [LFPMC 16.16.280] Construction within seismic hazard areas may require special review. [LFPMC 16.16.300] In general, any work to be conducted within a designated sensitive area requires issuance of an administrative Sensitive Areas Work Permit (SAWP). [LFPMC 16.16.080] King County applied for an SAWP on October 11, 2007. (Exhibit 10)

Landslide hazard areas must be protected by a 50 foot buffer, which may be reduced to not less than 25 feet under certain circumstances. [LFPMC 16.16.290(A)] Vegetation may only be removed from such areas upon issuance of an SAWP. [LFPMC 16.16.290(B)] When located on a steep slope, the regulations for steep slope hazard areas apply. [LFPMC 16.16.290(D)(1)]

Steep slope hazard areas also require a 50 foot buffer, which may be reduced to not less than 25 feet under certain circumstances. [LFPMC 16.16.310(A)] Vegetation may only be removed from such areas upon issuance of an SAWP. [LFPMC 16.16.310(A)(1)] Alterations to steep slopes and their buffers is allowed for “public and private trails”. [LFPMC 16.16.310(B)(2)] However, “[c]onstruction of impervious surfaces, such as asphalt and concrete, that would contribute to surface water runoff is prohibited unless the applicant demonstrates to the satisfaction of the planning director such action is necessary for soil stabilization or prevention of soil erosion”. [LFPMC 16.16.321(B)(2)]

- B.8. King County proposes to reconstruct the paved trail surface to 12 feet wide using standard asphalt concrete (as opposed to pervious asphalt concrete). Pervious asphalt concrete does not have the structural strength of standard asphalt concrete. (Exhibit 129-10, answer to Question 13) The widened trail will add 46,460 square feet (SF) of impervious surface to the Trail. (Exhibit 22, p. 3.4-11) A one foot wide crushed surface shoulder will be provided on the west side of the trail and a

three foot wide crushed surface shoulder will be provided on the east side of the trail. (Exhibits 22, p. 2-15, Fig. 2-3, and 86K-6)

B.9. In some areas, trail widening will necessitate alterations to upslope (west) trail-side water conveyance channels. Those alterations, in turn, will require some minimal cutting into the base of the upslope steep slopes. Gabion<sup>24</sup> walls are proposed where such cuts occur. Gabion walls will also be necessary along portions of the east side of the Trail. (Exhibits 25 and 31) (See Section C, below.)

C. Cross Slope and Drainage

C.1. The railbed and most of the surrounding near-surface soils are essentially impervious. (Exhibits: 23, Attachment p. 3; and 30, pp. 25 & 26)

C.2.<sup>25</sup> The Trail is bordered on its west, upslope side by a series of drainage ditches which convey water to 15 cross culverts which pass beneath the Trail, discharging eventually to Lake Washington. The Trail passes through 13 drainage basins. (Exhibit 4, p. 11) Approximately 79% of the trail has a slight westward cross slope. (Exhibits: 23, Attachment p. 5; 24, p. 9; and 31, p. 1) The water carried in the ditch and culvert system is a combination of seepage from the hillside above the Trail, surface water from the hillside above the Trail, runoff from the 79% of the Trail which presently slopes towards the ditches, and runoff from portions of the uphill street surfaces. Ponding of water in the ditches is common, especially along the southern end of the Trail. (Exhibits: 4, p. 11; 22, p. 3.2-10; and 31, Sheets E1.0 – E1.9)

C.3. The 1999 AASHTO Bicycle Guide recommends that trail cross slopes be between 2% and 3% and slope in one direction rather than having a centerline crown. When a trail is located along a hillside, a drainage ditch should be provided on the uphill side to intercept hillside runoff. [1999 AASHTO Bicycle Guide, pp. 38 & 56]

The 2006 WSDOT Design Manual echoes those recommendations. (Exhibit 128K-3, p. 1020-9, § 1020.06(15)) “Generally, surface drainage from the path will be adequately dissipated as it flows down the side slope.” (*Id.*)

C.4.<sup>26</sup> The 2005 Design Manual is structured around eight “Core Requirements.” Core Requirements #2 (Off-site Analysis), #4 (Conveyance System), #5 (Erosion and Sediment Control), #6 (Maintenance and Operations), and #7 (Financial Guarantees and Liability) are not in dispute. The 2005 Design Manual’s requirements regarding them will not be discussed.

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<sup>24</sup> In laypersons’ terms, a gabion is a heavy steel mesh basket, usually rectilinear in shape, which is filled with rocks. When properly stacked one upon another, a solid retaining wall is created.

<sup>25</sup> Finding revised after reconsideration.

<sup>26</sup> Last paragraph in Finding revised after reconsideration.

Core Requirement #1 (Discharge at the Natural Location) requires that runoff be discharged at its naturally occurring location(s). [2005 Design Manual § 1.2.1]

Core Requirement #3 (Flow Control) involves both flow control facilities and flow control Best Management Practices (BMPs). [2005 Design Manual § 1.2.3.1] The facility requirement depends upon the flow control area in which the site is located and is determined for each Threshold Discharge Area (TDA<sup>27</sup>). [2005 Design Manual § 1.2.3.1] As noted in Finding of Fact A.6.B, above, the Trail is located in a Conservation Flow Control Area (Conservation FC Area). In Conservation FC Areas, Level 2 flow control<sup>28</sup> is required unless severe erosion or flooding problems exist. [2005 Design Manual Table 1.2.3.A] Direct discharge and impervious surface exemptions to the flow control facilities requirement exist. Sites which drain directly to Lake Washington are exempt from the flow control facility requirement if they meet five criteria, one of which is that the conveyance system must be wholly located “within public right-of-way or a public or private drainage easement”. [2005 Design Manual § 1.2.3.1, p. 1-32]

The facility requirement in Conservation Flow Control Areas is waived for any *threshold discharge area* in which there is **no more than a 0.1-cfs difference** in the sum of developed 100-year peak flows for those target surfaces subject to this requirement and the sum of *historic site conditions* 100-year peak flows for the same surface areas.

[2005 Design Manual § 1.2.3.1.B, Exception #2, pp. 1-37 & 1-38, bold and italic in original]

The flow control BMP requirement applies to projects regardless of whether a flow control facility is required. [2005 Design Manual § 1.2.3.3] The flow control BMP requirement for projects located within rights-of-way “is incentive-based. In other words, implementation is achieved by giving credits for the application of flow control BMPs per Table 1.2.3.C (p. 1-43).” [2005 Design Manual § 1.2.3.3, Implementation of this Requirement, ¶ 2] The “credits earned may be used to reduce the size of a required flow control facility, qualify for a flow control facility exception or” certain other named purposes. [*Id.*; see also § 5.2] Separate flow control BMP requirements are provided for small (less than 22,000 SF) and large (22,000 SF or larger) project sites. [2005 Design Manual § 5.2.1] However, “If a proposed project is located primarily within an established public or private right-of-way, implementation of flow control BMPs is optional.” [2005 Design Manual § 5.2.2.2, emphasis added] Dispersion of runoff is a flow control BMC. [2005 Design Manual, Table 5.2.2.A] Where used, a 10 foot wide vegetated dispersion area may treat up to a 20 foot wide impervious surface. [2005 Design Manual, Appendix C]

<sup>27</sup>

A TDA is “an onsite area draining to a single natural discharge location”. [2005 Design Manual, Definitions, p. 22]

<sup>28</sup>

Level 2 flow control “matches historic durations for 50% of 2-yr through 50-year peaks AND matches historic 2- and 10-year peaks”. [2005 Design Manual, Table 1.2.3.A]



Core Requirement #8 (Water Quality) applies to all projects, including redevelopment projects<sup>29</sup> which will create or replace pollution-generating impervious surfaces (PGIS).<sup>30</sup> Transportation redevelopment projects are exempt from Core Requirement #8 if either the project as a whole or any TDA within the project site meets three criteria: Total new impervious surface is less than 50% of the existing impervious surface; less than 5,000 SF of new PGIS not fully dispersed will be added; and less than 35,000 SF of new pollution generating pervious surfaces not fully dispersed will be added. [2005 Design Manual, § 1.2.8, p. 1-60, Exemption 2]

- C.5. King County proposes to change the Trail’s cross-slope to a maximum of 2% towards the east (Lake) for it’s entire length.<sup>31</sup> No changes to the cross culverts are proposed. Some of the drainage channels along the west side of the Trail will be reshaped as a result of the trail widening. The redeveloped trail will cover about 3.66 acres, including the graveled shoulders, of which approximately one acre will be added impervious surface. (Exhibits 4, 22, 31, and 86K-4)
- C.6. The Trail is situated near the “bottom” of several drainage basins which collectively cover approximately 5,000 acres. The Trail passes through 15 TDAs, including Lyon and McAleer Creeks. The calculated increase in flow rate due to Trail widening is less than or equal to 0.1 cfs for every TDA except McAleer Creek. King County has requested a variance, which the City has approved, for that TDA only. (Exhibits: 31, pp. 5 and 6; and 40) The Trail will no longer contribute drainage flows to the ditch system, thus reducing the volume of water carried by that system.
- C.7.<sup>32</sup> The new Trail surface will be less than half the area of the existing Trail surface. The only portions of the Trail which are considered PGIS “are where the trail improvements intersect local access streets.” (Exhibit 4, p. 2) “[A]ll threshold discharge areas have less than 5,000 square feet of new and replaced PGIS proposed.” (Exhibit 4, p. 1; see also Exhibit 4, p. 15) The Trail redevelopment proposal is exempt from the water quality control requirements of the 2005 Design Manual.
- C.8.<sup>33</sup> The plans of record in this proceeding do not identify any existing or proposed runoff controls on the upslope side of any of the 11 street/driveway crossings within the City.<sup>34</sup> (Exhibit 6, Sheets D1.0 – D1.9, C1.0 – C1.10, L1.0 – L1.14, L5.0, L5.1, and L5.2) King County’s Request for Reconsideration

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<sup>29</sup> A ‘redevelopment project’ is one “that proposes to add, replace, or modify impervious surface”. [2005 Design Manual, Definitions, p. 16]

<sup>30</sup> A “pollution-generating impervious surface” is one “considered to be a significant source of pollutants in surface and storm water runoff. Such surfaces include those that are *subject to vehicular use*” or storage of certain materials. [2005 Design Manual, Definitions, p. 15, italics in original] The term “subject to vehicular use” is further defined by footnote and expressly excludes “paved bicycle pathways”. [2005 Design Manual, Definitions, p. 15, FN 1]

<sup>31</sup> If the Trail were cross-sloped towards the west, the higher edge along the east would necessitate higher and/or more retaining walls along the east side of the Trail. (Exhibit 86K-6 and testimony)

<sup>32</sup> Finding added after reconsideration.

<sup>33</sup> Finding added after reconsideration.

<sup>34</sup> See Finding of Fact D.2, below, for a listing of each crossing.

states that only one street crossing is presently protected by a trench drain: NE 153<sup>rd</sup> Street at approximately Station 23+75. (Exhibit 135, p. 7, ll. 6 – 9) The plans depict regrading of the upslope approach at only the NE 157<sup>th</sup> Street crossing. (Exhibit 6, Sheet L2.6)

The City’s drainage review engineer (Hammond Collier Wade Livingstone or HCWL) questioned whether “existing trench drains [will] be replaced, will bermed sections be replaced with trench drains to prevent runoff crossing the trail and onto private property.” (Exhibit 37, p. 2, § C) King County’s drainage engineer (PACE) responded that “drainage patterns at existing crossings of the trail are proposed to remain in their existing condition post widening. This project does not seek to correct existing drainage issues at crossings that are not impacted by the trail widening.” (Exhibit 39, p. 2, Item C)

C.9. For most of the Trail’s length, 10 feet or more of vegetated area will exist along the east side of the trail after redevelopment. (Exhibit 131)

D. Traffic Controls

D.1. The Burke-Gilman Trail through Lake Forest Park is a “constrained corridor.” (Exhibit 23, Attachment p. 1, and testimony) The 1975 FEIS for the Burke-Gilman Trail indicated “that motorized vehicles would be granted the right of way at all street intersections and that stop signs could be posted. Private crossings of the trail were not considered street intersections and were not signed or controlled”. (Exhibit 22, p. 1-14)

D.2.<sup>35</sup> The Trail crosses 11 streets or driveways, most located on the southern half of its route through the City.<sup>36</sup>

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<sup>35</sup> “ID #” column added to the table and the “A” – “D” naming of the four legs of the NE 155<sup>th</sup> Street crossing eliminated after reconsideration (both steps taken to facilitate subsequent reference to individual crossings). The “ID #” matches those found in Exhibits 151.1 and 153B.

<sup>36</sup> The data in the following Table is derived from Exhibits 1, 4 (aerial photograph), 22, 26, 27, 52, 80, and 151.1 and the Examiner’s site visits. The Examiner takes responsibility for errors in the table caused by any misinterpretation of the source information. (Footnote revised after reconsideration.)

	Crossing	Station (C/L <sup>37</sup> )	Status	Homes Served	Traffic Control	
	NE 147 <sup>th</sup> Street	8+00	Public to E side of trail; Edge water Ln Private	c.33 to first S connec tion in Seattle ; 4 on N dead- end	Stop signs on trail; warning sign eastbound on street; chicanes N and S of crossing	
	NE 151 <sup>st</sup> Street- S leg N leg	17+50 18+25	Public to W side of trail l	4 or 5	Stop signs on trail; yield on street approaches; chicane N of crossing	

<sup>37</sup> “C/L” means “centerline.” The Station given here represents the centerline of the crossing, rounded off.

	Crossing	Station (C/L <sup>37</sup> )	Status	Homes Served	Traffic Control	
	NE 153 <sup>rd</sup> Street	23+75	Public to E side of trail; Be ach Dr NE pri vat e	9	Stop signs on trail; chicanes N and S of crossing	
	NE 155 <sup>th</sup> Street	27+30	Public to W side of trail; pri vat e cro ssi ng	3	Stop signs	

	Crossing	Station (C/L <sup>37</sup> )	Status	Homes Served	Traffic Control	
	NE 155 <sup>th</sup> Street	29+25	Public to W side of trail; private crossing	3	Stop signs	
	NE 155 <sup>th</sup> Street	30+85	Public to W side of trail; private crossing	1		

	Crossing	Station (C/L <sup>37</sup> )	Status	Homes Served	Traffic Control	
	NE 155 <sup>th</sup> Street	31+50	Public to W side of trail; private crossing	3	Stop sign; chicane N of crossing	
	NE 157 <sup>th</sup> Street	35+25	Private	4	Yield on trail; warning sign eastbound on street	
	NE 165 <sup>th</sup> Street	53+25	Public	18 on dead- end to S; 50± on through- street to N	Stop signs on trail; warning signs on street; chicanes N and S of crossing	
	NE 170 <sup>th</sup> Street	70+40	Public	50± on through- street to S	Signalized	

	Crossing	Station (C/L <sup>37</sup> )	Status	Homes Served	Traffic Control	
	Ballinger Way NE	81+75	Public	30± on Beach Drive NE dead- end	Signalized	

- D.3. Some of the stop signs now on the trail were installed at the request/direction of a former King County Councilperson. The record is very vague as to the proceedings which led to placement of some of the stop signs. The neighbors indicate they were posted after complaints filed by local residents in the 1980s. (Exhibit 52 and testimony) In one survey of bicyclists' compliance with posted STOP signs on the Trail, less than 3% were observed to come to a full stop before proceeding through the intersections. (Exhibit 22, p. 3.11-3)
- D.4. The posted speed limit on the Trail through Lake Forest park is 10 mph. (Exhibit 22, § 3.6.2.4, p. 3.6-5, ¶ 2) In or around 2005, King County issued a public "Fact Sheet" in which it stated that it would be changing the Trail signage to provide right of way to Trail users at all crossings (obviously, although not stated on the Fact Sheet, except at signalized intersections) and that "Speed limits will be reduced to 10 mph through Lake Forest Park." (Exhibit 126, unnumbered pp. 2 and 3, respectively)
- D.5.<sup>38</sup> The 1999 AASHTO Bicycle Guide recommends a design speed of 20 mph (posted speed of 15 mph) for relatively flat, shared use paths. [1999 AASHTO Guide, p. 36] King County has used a design speed of 20 mph as the basis for its rehabilitation design and intends to allow the maximum speed limit permissible under KCC 7.12.295(A): 15 mph. (Exhibit 22, § 2.5.1.8, p. 2-29)
- D.6.<sup>39</sup> Path-roadway intersections fall into one of three categories: midblock, adjacent path, or complex. [AASHTO Bicycle Guide, p. 46] Most, if not all, of the Burke-Gilman Trail crossings fall into the

<sup>38</sup> Finding revised after reconsideration.

<sup>39</sup> This paragraph given a separate Finding of Fact number after reconsideration.

adjacent path category: The street/driveway crossed by the Trail intersects another street/driveway running parallel to the Trail, immediately adjacent to the Trail. “T-intersection[s] (including driveways)” fall into this category. [AASHTO Bicycle Guide, p. 48] “Right-of-way assignment, traffic control devices, and separation distance between the roadway and path are also important variables ....” [*Id.*]

Volume, speed and highway classification should not be the only criteria to consider when assigning right of way at a path crossing. The comfort and convenience of the path user, and the unique behavioral characteristics of the path user and motorist alike, must also be taken into consideration.

[1999 AASHTO Bicycle Guide, p. 49] “A regulatory traffic control device should be installed at all path-roadway intersections.” [1999 AASHTO Bicycle Guide, p. 50] “Four-way stops at path-roadway intersections are not recommended because of frequent confusion about or disregard for right of way rules. Yield signs may be acceptable at some locations, such as low-volume, low-speed neighborhood streets.” [*Id.*] “[U]niform application of traffic control devices, as described in the MUTCD, provides minimum traffic control measures which should be applied.” [1999 AASHTO Bicycle Guide, p. 53, footnote omitted]

- D.7. The 2006 WSDOT Design Manual repeats much the same guidance (almost verbatim in some cases). (Exhibit 128K-3, pp. 1020-4 – 1020-7) “Bicycles are considered vehicles in Washington State, and bicycle path traffic can be classified as vehicular traffic for MUTCD warrants.” (Exhibit 128K-3, p. 1020-5)
- D.8.<sup>40</sup> Several provisions of state law have been cited by some of the parties for the proposition that state law requires that the Trail be given priority at all crossings. (See especially Exhibit 147.) Those law sections and definitions necessary to understand them are provided below.

State motor vehicle laws are contained in Title 46 RCW, Motor vehicles. The definitions in Chapter 46.04 RCW generally apply to all provisions in Title 46 RCW. [RCW 46.04.010] A “highway” is “the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.” [RCW 46.04.197] A “vehicle” “includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. ... Bicycles shall not be considered vehicles for the purposes of chapter 46.12, 46.16, or 46.70 RCW. ...”<sup>41</sup> [RCW 46.04.197] The Burke-Gilman Trail is a highway by definition as it is publicly maintained and is open to bicycle usage.

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<sup>40</sup> Finding added after reconsideration.

<sup>41</sup> Chapters 46.12, 46.16, and 46.70 RCW deal, respectively, with titling and registration requirements, license requirements, and dealer and manufacturer requirements. None have any bearing on the present applications.



A “crosswalk” is “the portion of the roadway between the intersection area and a prolongation or connection of the farthest sidewalk line or in the event there are no sidewalks then between the intersection area and a line ten feet therefrom, except as modified by a marked crosswalk.” [RCW 46.04.160] The “intersection area” is “the area embraced within the prolongation or connection of the lateral curb lines, or, if none then the lateral boundary lines of the roadways of two or more highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.” [RCW 46.04.220] “Roadway” is “that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. ...” [RCW 46.04.500] The paved portion of the Trail is the “roadway” as it is the area designed for travel by bicycles. When the paved portion of the trail crosses a public street where crosswalks are not delineated in the direction of Trail traffic (as at Crossings 1 and 3), the intersecting pavement areas are the “intersection area;” the Trail itself is not a crosswalk, it is the roadway. Crosswalks are implied on each side of the crossing streets and the Trail even though not expressly delineated. When the Trail crosses a private way or driveway (as at Crossings 2 and 4 – 7), the Trail itself is not a crosswalk but a sidewalk is presumed on either side of the Trail although not expressly delineated.

Chapter 46.61 RCW, Rules of the road, contains regulations regarding vehicle operation on public roads. When two vehicles approach an uncontrolled intersection at the same time, “the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.” [RCW 46.61.180(1)] “Preferential right-of-way may be indicated by stop signs or yield signs as authorized in RCW 47.36.110.” [RCW 46.61.190(1)] “In order to provide safety at intersections on the state highway system, the department may require persons traveling upon any portion of such highway to stop before entering the intersection. ... When the findings of a traffic engineering study show that the condition of an intersection is such that vehicles may safely enter the major artery without stopping, the department or local authorities in their respective jurisdictions shall install and maintain a ‘Yield’ sign.” [RCW 47.36.110]

“The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles lawfully approaching on said highway.” [RCW 46.61.205, emphasis added] “If right-of-way priority is assigned to streets and driveways, and not the Trail, then bicyclists who do not first slow or yield are not ‘lawfully approaching’ as contemplated by the statute, and vehicles are not required to yield the right-of-way to them (unless they are already in a marked crosswalk ...).” (Exhibit 153, p. 25, § 39, ll. 7 – 11)

“The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling ....” [RCW 46.61.235(1)] But equally importantly, state law provides that “No pedestrian or bicycle shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a

vehicle which is so close that it is impossible for the driver to stop.” [RCW 46.61.235(2)] This law controls priority at a crossing “when a bicyclist and pedestrian is actually in the crosswalk, ... This statute was not intended to address which approaching vehicle on which leg of an intersection has general right-of-way priority.” (Exhibit 153, p. 24, § 38, ll. 16 – 20) Further, as noted above, under state law the Trail is a roadway, not a crosswalk. Since this law pertains to activities within crosswalks, it offers no guidance whatsoever regarding priority at Trail crossings.

- D.9.<sup>42</sup> The MUTCD provides uniform standards for traffic signs, signals, and pavement markings. The MUTCD classifies its textual provisions into one of four categories: Standard (“a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device.”); Guidance (“a statement of recommended, but not mandatory, practice in typical situations”); Option (“a statement of practice that is a permissive condition and carries no requirement or recommendation.”); and Support (“an informational statement that does not convey any degree of mandate, recommendation, ...”). [MUTCD, pp. I-1 – I-3, *bolding eliminated from all quoted phrases*] The MUTCD “shall not be a legal requirement for [traffic control devices] installation.” [MUTCD, § 1A.09, Standard, *bolding omitted*]

The use of traffic signals is subject to warrant analysis; the use of stop and yield signage is not. [MUTCD § 4C.01; see also §§ 2B.05, 2B.07, and 2B.09] To be effective, traffic control devices “should” fulfill a need, command attention, be clear, command respect, and give adequate notice. [MUTCD, § 1A.02, Guidance, p. 1A-1]

STOP signs “should be used” in “one or more of” four circumstances, only one of which is remotely applicable to Trail crossings: “Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonable compliance with the law”. [MUTCD, § 2B.05, Guidance, p. 2B-6] “STOP signs should be installed in a manner that minimizes the numbers of vehicles having to stop. At intersections where a full stop is not necessary at all times, consideration should be given to using less restrictive measures such as YIELD signs”. [*Id.*] Considerations include stopping the direction with obscured vision or, alternatively, stopping the direction that has the best sight distance of the opposing traffic. [MUTCD, § 2B.05, Support B and D, p. 2B-7] All-way STOP may be appropriate where a user, after stopping, cannot safely negotiate the intersection unless the opposing traffic also stops. [MUTCD, § 2B.07, Option C, p. 2B-8]

YIELD control “may be used instead of STOP signs” in “one or more of” four circumstances, two of which plausibly could apply to Trail crossings: “When the ability to see all potentially conflicting traffic is sufficient to allow a road user traveling at the posted speed, the 85<sup>th</sup>-percentile speed, or the statutory speed to pass through the intersection or to stop in a reasonably safe manner” and “where a

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<sup>42</sup> Finding revised after reconsideration.

special problem exists and where engineering judgment indicates the problem to be susceptible to correction by use of the YIELD sign.” [MUTCD, § 2B.09, Options A and D, p. 2B-8]

Part 9 of the MUTCD specifically addresses traffic controls for bicycle facilities. The Burke-Gilman Trail is a “shared-use path” in MUTCD terminology. [MUTCD, § 9A.03, Standard 5, p. 9A-1] “[L]ateral sign clearance [on shared use paths] shall be a minimum of [3 feet] and a maximum of [6 feet] from the near edge of the sign to the near edge of the path”. [MUTCD, § 9B.01, Standard, p. 9B-1] “

[P]riority at a shared-use path/roadway intersection should be assigned with consideration of the following:

- A. Relative speeds ...;
  - B. Relative volumes ...; and
  - C. Relative importance of shared-use path and roadway.
- Speed should not be the sole factor used to determine priority ....

When priority is assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches.

[MUTCD, § 9B.03, Guidance, p. 9B-2, emphasis added]

- D.10. Subsection 7.12.295(A) KCC addresses speed on County trails: “No person shall travel on a trail at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. ... Travel at speeds in excess of 15 miles per hour shall constitute in evidence a prima facie presumption that the person violated this section.” [sic.]
- D.11.<sup>43</sup> Two types of sight distance are relevant to Trail crossing design and traffic control: Stopping Sight Distance (SSD), also referred to as “approaching sight distance” in Exhibit 153B, and Entering Sight Distance (ESD), also referred to as “departure sight distance” in Exhibit 153B.

SSD “is defined as the sum of two distances: the distance traveled during perception and reaction time and the distance required to stop the vehicle.” (Exhibit 153, § 17, pp. 11 and 12) For an uncontrolled intersection, SSD needs to be calculated for each leg of the intersection. The stopping distance for a bicycle traveling at the design speed of 20 mph on a flat or nearly flat surface is 127 feet.<sup>44</sup> (Exhibit 22, § 3.11.3.1, p. 3.11-7, ¶ 2; see also 1999 AASHTO Bicycle Guide, p. 42, Fig. 19 (English Units)) Because of the very constrained approaches to the Trail, especially at Crossings 1 –

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<sup>43</sup> Finding revised after reconsideration.

<sup>44</sup> The stopping distance for a bicycle traveling at the proposed posted speed limit of 15 mph on a nearly flat surface is 85 feet. (Exhibits: 22, § 3.11.3.1, p. 3.11-7, ¶ 2; 129-10, p. 12, Answer to Question 33; 134, p. 1; and 135, p. 18; see also 1999 AASHTO Bicycle Guide, p. 42, Fig. 19 (English Units)) (The February 24<sup>th</sup> Decision erroneously labeled the 20 mph stopping distance as the 15 mph stopping distance.) The Examiner, like King County, has used the design speed to calculate sight distance.

8, King County assumed an automobile speed of 3 mph on the approach. The SSD for that automobile speed is 19 feet. (Exhibit 153B, p. 16, Table 2) With that information in hand, King County concluded that it needed to provide a clear “sight distance triangle” extending 127 feet down the Trail and 19 feet back on the street/driveway crossings. (Exhibit 153B, p. 16) That sight distance triangle was incorporated into the redevelopment plans at Crossings 1 – 9. (Exhibit 6, Sheets L1.0 – L1.12)

ESD “refers to the distance that a driver must be able to see to spot an approaching [bicycle], decide whether to proceed, and safely get across the intersection ahead of the approaching [bicycle].”<sup>45</sup> (Exhibit 153, § 17, p. 12, ll. 2 – 4) Calculation of ESD includes factors for width of the highway (Trail) being crossed and speeds of vehicles on both legs of the crossing. The ESD for street/driveway crossings of the Trail is between 180 feet and 326 feet, depending upon assumed Trail width and automobile and bicycle speeds. (Exhibits: 153, § 26, pp. 16 and 17; 153B, pp. 12 – 14<sup>46</sup>)

D.12.<sup>47</sup> King County proposes to give priority at Crossings 1 - 8 (all crossings other than NE 165<sup>th</sup> Street, NE 170<sup>th</sup> Street, and Ballinger Way) to Trail users, to eliminate all chicanes, and to raise the posted speed limit to 15 mph.<sup>48</sup> While the majority of the Trail will be paved with asphalt concrete, street/driveway crossings will be paved with cement concrete, with control joints across the Trail spaced every 18 inches, to create visual/textural differentiation between the crossing point (“intersection area”) and the rest of the trail. A single bollard will be placed in the center of the trail at each end of the cement concrete crossing area. Thirty-inch wide cement concrete “warning bands,”<sup>49</sup> with ¼” deep grooves across the Trail every 1.5”, will be inserted across the trail 30 feet on each side of crossings to visually alert bicyclists to the impending crossing. (Exhibits: 6, Sheets L1.0 – L1.15 and L5.0; 15; and 135.1, § 8, pp. 3 and 4)

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<sup>45</sup> King County’s original traffic consultant, The Transpo Group (Transpo), included ESD in its March 9, 2005, “Burke-Gilman Trail Crossing Plan.” (Exhibit 153B, pp. 12 – 14) Transpo dropped all discussion of ESD in its May 16, 2005, “Burke-Gilman Trail Crossing Plan.” (Exhibit 151.1) (The March 9, 2005, report is not labeled as a draft report; the May 16, 2005, report is not labeled as an update, supplement, or final report. In most regards the content of both is identical.) Since King County proposes to give right-of-way priority at Crossings 1 – 8 to Trail traffic, the Examiner concludes that elimination of consideration of ESD was an error: Vehicles stopping or yielding as they approach to cross the Trail must be able to see far enough down the Trail to properly decide whether it is safe to cross. That is precisely what ESD measures.

<sup>46</sup> The Examiner concurs with the author of Exhibit 153 that Transpo’s ESD calculation used two erroneous factors: It had the Trail narrower than proposed (10 feet vs. 12 feet); it assumed a completely unreasonable automobile crossing speed (25 mph) given that King County proposes to require all automobiles to stop or yield at Crossings 1 – 8. (Exhibit 153, § 27, pp. 17 and 18)

<sup>47</sup> Finding revised after reconsideration.

<sup>48</sup> King County’s transportation consultant reportedly recommended keeping the 10 mph speed limit. (See Exhibit 52, p. 1, ¶ 2.) The consultant’s report cited in Exhibit 52 is not of record in this proceeding, so this fact cannot be verified with original source evidence.

<sup>49</sup> King County referred to these bands as “rumble strips” during the hearing. King County now regrets use of that term as it misled the Examiner as to their purpose. (Exhibit 135)

Vegetation and fencing will be removed as necessary to provide SSD triangles at each intersection. (*Id.*)

Proposed traffic control signage would require motorists on NE 147<sup>th</sup>, NE 151<sup>st</sup>, NE 153<sup>rd</sup>, the NE 155<sup>th</sup> complex, and NE 157<sup>th</sup> Street to YIELD to Trail traffic. (Exhibit 15) The County has committed to an all-way STOP control at the NE 165<sup>th</sup> Street crossing.<sup>50</sup> (Exhibit 38) The signalized NE 170<sup>th</sup> Street and Ballinger Way NE intersections will have some trail reconfiguration in the vicinity of the intersections, but will function as they now do. (Exhibit 6)

D.13. King County’s position on this issue is summarized in Exhibit 130:

The County’s design is a permissible application of the many standards and guidelines that relate to trail design and traffic safety. ... The County does not deny that the historical alignment of the corridor, together with that of the various streets and driveways which cross it, gives rise to certain safety-related concerns. ... In sum, the proposal is not hazardous and does not create any new conflicts with existing or anticipated traffic in the neighborhood. Nothing more is required to satisfy [CUP] Criterion (H).

(Exhibit 130, p. 16, ll. 13 – 22)

D.14.<sup>51</sup> The streets which cross the Trail south of NE 165<sup>th</sup> Street, with the exception of NE 151<sup>st</sup> Street which basically has a straight-on approach on both sides of the Trail, all approach the Trail from the west at an acute angle with a “last minute” small radius turn to cross the Trail at a nearly right angle. The approaches from the east going westbound generally are parallel with the Trail, also with a “last minute” turn to cross the Trail at a nearly right angle.<sup>52</sup> For the most part, the Trail widening will occur on the east side of the Trail. The following table, measured from Exhibits 15 and 27, presents the characteristics of each of those intersections before and after Trail redevelopment; identification numbers are the same as in Finding of Fact D.2, above.

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<sup>50</sup> King County initially fought imposition of STOP signs for Trail users at this crossing: The submitted Sign Layout Plan depicts STOP signs for street traffic with only YIELD TO PEDS signs on the Trail approaches. (Exhibit 15, Sheet SL1.4) Exhibit 38 is a textual amendment to that Plan.

<sup>51</sup> Clause added at end of paragraph, “ID #” column added to table, and the “A” – “D” naming of the four legs of the NE 155<sup>th</sup> Street crossing eliminated after reconsideration.

<sup>52</sup> Exhibit 122, submitted by King County, is a table which includes the approximate angle of each intersection. The author appears to have calculated only the angle at which the short tangent sections immediately adjacent to the Trail intersect with the Trail. (“Tangent Section” as used here means the straight line distance between the end of a curve and the near edge of the Trail pavement/shoulder. The Examiner apologizes to those readers who are civil engineers if this use of the term does not comport with its standard meaning in their profession.)

ID #	Crossing	Present Tangent Section Length		Post-Redevelopment Tangent Section Length	
		West Side	East Side	West Side	East Side
1	NE 147 <sup>th</sup> Street	± 10'	10'	± 10'	< 10'
2	NE 151 <sup>st</sup> Street	N/A	N/A	N/A	N/A
3	NE 153 <sup>rd</sup> Street	± 15'	< 10'	± 15'	± 0'
4	NE 155 <sup>th</sup> Street	10 – 15'	< 10'	± 10'	< 10'
5	NE 155 <sup>th</sup> Street	± 15'	± 20'	± 10'	± 20'
6	NE 155 <sup>th</sup> Street	± 20'	20' +	± 15'	20' +
7	NE 155 <sup>th</sup> Street	± 15'	< 10'	± 15'	< 10'
8	NE 157 <sup>th</sup> Street	± 10'	< 10'	< 10'	± 0'

D.15. The residence at 15044 Beach Drive NE (Tracy residence), at the end of NE 151<sup>st</sup> Street, is now faced and will remain faced with a particularly unusual and awkward situation: The garage is so close to the Trail and so little maneuvering room is available that a car backing out of the garage must back across the Trail. King County and Tracy have as of yet not reached a mutually acceptable solution to this condition. (Exhibits 52, 102, and 129-3)

D.16.<sup>53</sup> Burke-Gilman Trail traffic at the 61<sup>st</sup>, 65<sup>th</sup>, and 68<sup>th</sup> Avenues crossings, the latter being a private street “serving an enclave of residences along the Sammamish River,” between Lake Forest Park and Bothell is STOP sign controlled. (Exhibit 142, quote from ¶ 4) In Seattle, Trail users are required to yield to motorists at crossings. (Exhibit 22, § 1.5.1.1, p. 1-14, ¶ 5)

Traffic on King County’s paved Cedar River Trail (See Exhibit 1, p. 47, for location.) is STOP sign controlled at virtually all crossings which are visible from SR 169, including locations that appear to be private crossings serving only one residence. (Official notice<sup>54</sup>)

#### E. Vegetation Removal

E.1. The Trail corridor is fairly heavily wooded, especially on the west, upslope side. (Exhibits 2, 22, and 86K-6) Tree roots are causing pavement buckling (“root heave”) in some areas. (Exhibit 22, § 2.2.1, p. 2-5, ¶ 3)

E.2. Some vegetation removal will be necessary to widen the Trail. In general, clearing will be limited to a strip about 22 feet wide centered on the Trail. Shrubs, bushes, vines, and trees within sight distance

<sup>53</sup> Finding revised after reconsideration.

<sup>54</sup> The undersigned Examiner provides hearing examiner services to the City of Covington and travels SR 169 when going to and from Covington. The Cedar River Trail closely parallels SR 169 for several miles outside Renton. The trail signage is clearly visible to motorists driving on SR 169.

triangles at each Trail crossing will be removed and replaced with low-growing vegetation (less than three feet high). (Exhibit 22, § 3.4)

- E.3. King County retained a certified arborist to catalogue and assess all trees over 6” in diameter along the Trail corridor. The arborist counted only those trees close enough to the trail to potentially be affected by trail widening. The arborist catalogued “100 tree groups or individuals”.<sup>55</sup> (Exhibit 2, p. 1, Summary bullet Point 1)
- E.4. Lake Forest Park adopted Tree Protection and Replacement regulations, Chapter 16.14 LFPMC.<sup>56</sup> The regulations focus on “significant trees” which are defined as “any healthy tree six inches or greater in diameter (dbh)” plus trees over four inches dbh if determined by the City to be unique. [LFPMC 16.14.030(P)] The regulations require retention of “a minimum of 35 percent of all significant trees”. [LFPMC 16.14.070(D)] Trees within regulated sensitive areas are subject to Chapter 16.16 LFPMC regulations. [LFPMC 16.14.070(E)(2)]

Except for emergencies and work within City rights-of-way, removal of trees within the City requires issuance of a permit under Chapter 16.14 LFPMC. [LFPMC 16.14.040 and .050] The regulations establish two classes of tree removal permits: Level I permits allow limited removal of trees in certain areas of the City; Level II permits are required where greater numbers of trees are to be removed. [LFPMC 16.14.060] Permits required under Chapter 16.14 LFPMC are classified as Ministerial Administrative Decisions. [LFPMC 16.26.030(E)(1)(b)]

Each significant tree removed under a Level II permit must be replaced. [LFPMC 16.14.080(A)] If the replacement tree is deciduous, it must have a caliper of at least 1.5 inches; if the replacement tree is coniferous, it must have a height of six to eight feet. [LFPMC 16.14.080(B)(1)] All replacement trees must be planted on the site from which trees were removed unless the City authorizes replacement off-site under limited situations. [LFPMC 16.14.080(D) and (E)] Significant trees that are not to be removed must be protected from damage. [LFPMC 16.14.100]

- E.5. Vegetation in landslide hazard areas may be removed upon issuance of an SAWP. [LFPMC 16.16.290(B)] Trees in a steep slope hazard area may be removed upon issuance of an SAWP if

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<sup>55</sup> “Trees are considered a ‘group’ where several of the same species are growing closely together.” (Exhibit 2, p. 1, Scope of Work, ¶ 2) The argument made by some hearing participants that the arborist missed many trees is not persuasive. The misunderstanding, which is what the Examiner believes it is, derives from the arborist’s use of “tree groups”. For example, on Sheet 4 of the plans attached to Exhibit 2, Tree #65 is a 200 foot long “group” of Lombardy poplars, Tree # 66 is a 320 foot long “group” of Cottonwoods, and Tree # 67 is a 185 foot long “group” of Black locusts. The arborist did not enumerate the trees in such groups, but the areal extent of the groups is clear.

<sup>56</sup> The City Council amended those regulations by Ordinance No. 990, effective in November, 2008. (Those amendments are to sunset on June 30, 2009.) The Ordinance No. 990 amendments cannot be applied to this project as King County filed a Level II Tree Removal Permit Application on October 11, 2007, and is vested to the regulations as they existed on that date. (Exhibit 12) The description of Chapter 16.14 LFPMC’s provisions provided herein is based on the code as it existed before passage of Ordinance No. 990.

associated with a public trail. [LFPMC 16.16.310(A)(1) and (B)(2)] Trees, generally speaking, are not to be removed from wetlands and streams or their buffers. [LFPMC 16.16.330 and .360]

- E.6. King County estimates that approximately 60 trees will have to be removed as a result of the project. The County proposes to replant trees at a 1:1 ratio or better. (Exhibit 22, § 3.4.4, p. 3.4-13, ¶ 1) Hedges and fencing removed to improve sight distance at crossing points would be replaced, although not necessarily with the same exact species. (Exhibits: 22, § 3.7.2.1, p. 3.7-5, ¶¶ 4 & 5; 6, Sheets L3.0 – L3.10; 7; and 8) No trees are proposed to be removed from wetlands. (Exhibit 117)
- E.7. King County filed a Level II Tree Removal Permit Application on October 11, 2007, to remove 61 significant trees from the Trail corridor. Of those trees, 41 are healthy and 20 are “potentially compromised.” (Exhibit 12) Some 36 of those trees are in sensitive areas buffers and/or steep slopes; none are in wetlands or streams. King County proposes to plant 66 trees at an off-site wetland mitigation site (See Findings of Fact in Section F, below.) and 49 on site. (Testimony)
- F. Wetlands and Streams
- F.1. Eight wetlands were delineated along the Trail corridor using the Washington State Department of Ecology’s (DOE’s) accepted three parameter methodology.<sup>57</sup>

Wetland	Category	Standard Buffer <sup>58</sup>	Vegetation Class	Exhibit 32 Sheet
1	3	50’	Emergent	W2.10
2	3	50’	Emergent, scrub/shrub	W2.8
3	3	50’	Emergent, scrub/shrub	W2.7
4	2	100’	Emergent, forested	W2.6
5	3	50’	Emergent	W2.4
6	3	50’	Emergent	W2.3
7	3	50’	Emergent	W2.2
8	3	50’	Emergent	W2.0

(Exhibit 24, p. 7) Wetlands 2 and 4 are associated with Lyon and McAleer Creeks, respectively. The remaining six delineated wetlands are at least partially associated with the drainage ditches adjacent to the Trail. (Exhibit 24, pp. 4 and 5)

- F.2. Six streams pass beneath the Trail.

<sup>57</sup> A wetland must exhibit hydrophytic vegetation communities, hydric soils, and wetland hydrology. (Exhibit 24, pp. 1 and 2)

<sup>58</sup> Standard buffer as required by LFPMC 16.16.320(A).



Stream	Type	Standard Buffer <sup>59</sup>	Vegetation Class	Exhibit 32 Sheet
Lyon Creek	1	115'	Forest, shrub, herbaceous	W2.9
McAleer Creek	1	115'	Forest, shrub, herbaceous	W2.6 and W2.7
Stream 3	3	35'	Forest, shrub, herbaceous	W2.1
Stream 4	2	50'	Shrub, herbaceous	W2.5
Stream 5	2	50'	Shrub, herbaceous	W2.11
Bsche'tla Creek			Culverted	N/A <sup>60</sup>

(Exhibit 24, p. 7) Lyon and McAleer Creeks support salmonids; the others are steep hillside drainages which are unlikely to support fish. (Exhibit 24, p. 6)

- F.3. The City regulates wetlands, streams, and their buffers under Chapter 16.16 LFPMC. The regulations allow the buffer widths stated above to be reduced or averaged, and require even larger buffers in some cases. [LFPMC 16.16.320 and .350] Generally speaking, wetlands, streams, and their buffers are not to be altered. Where alterations are allowed pursuant to a SAWP, mitigation is required. [LFPMC 16.16.330, .340, .360, and .370] Required mitigation ratios for Category 2 and 3 wetlands are 3:1 and 2:1, respectively. [LFPMC 16.16.340(G)(1)]
- F.4. Trail redevelopment will result in the fill of 2,169 SF of wetland (in four of the eight wetlands), impacts to 21,221 SF of wetland buffer, and impacts to 12,585 SF of stream buffer. (Exhibits 32; and 24, p. 12)
- F.5. King County proposes to completely replace the Lyon Creek Bridge.<sup>61</sup> The Lyon Creek Bridge is only eight feet wide and 20 feet long. (Exhibits: 22, § 2.2.1, p. 2-6; and 27, Sheet K2.6) It “constricts the channel and impinges on the floodplain due to its short span and abutments at the water’s edge.” (Exhibit 22, § 3.4.3.1, p. 3.4-9, ¶ 5) The replacement bridge will be 12 feet wide and 60 feet long, providing a less obstructed overflow area beneath the bridge. (Exhibits: 22, § 2.5.1.3, p. 2-13; 22, § 3.4.3.1, p. 3.4-9; and 25, Sheet SH1.6)
- F.6. King County proposes to mitigate those impacts both on-site and off-site. It has elected to use DOE’s suggested mitigation ratio of 6:1 rather than the lower mitigation ratios allowed under the LFPMC. It is proposing 5,280 SF of on-site wetland mitigation, 14,817 SF of on-site wetland buffer mitigation, and 13,033 SF of on-site stream buffer mitigation. (Exhibits: 32, Sheets W1.0 – W3.9; and 24, p. 12)

<sup>59</sup> Standard buffer as required by LFPMC 16.16.350(A).

<sup>60</sup> Not shown on Exhibit 32 as it is fully culverted. See Exhibit 22, p. 3.2-7, Fig. 3.2-2.

<sup>61</sup> The McAleer Creek Bridge was replaced in 1996/1997 with a 12 foot wide, 70 foot long steel span. (Exhibits: 22, § 2.2.1, p. 2-6; and 27, Sheet K2.6) It does not need replacement.

Because the narrow trail corridor and steep slopes on its west side, sufficient area for successful mitigation does not exist on site. King County has identified, with the City's active assistance, an off-site mitigation property owned by the City. This parcel is located along Ballinger Way NE and is traversed by a tributary to Lyon Creek. King County proposes to provide 10,214 SF of wetland mitigation and 4,086 SF of wetland buffer mitigation at that site. (Exhibits: 32, Sheets W4.0 – W4.3; and 24, pp. 12 and 13) The off-site parcel has not previously been used for either on-site or off-site wetland mitigation. (Testimony)

- F.7. King County applied for a SAWP on October 11, 2007, for wetland and stream impacts. (Exhibit 10)
- F.8. On January 8, 2009, the U.S. Army Corps of Engineers issued a letter determination that the small amount of proposed wetland fill is covered by Nationwide Permit 14. (Exhibit 128K-2)
- G. Trail Amenities
  - G.1. King County proposes to remove eight seating benches, two trash receptacles, and one water fountain during the demolition phase of the redevelopment project. (Exhibit 6)
  - G.2. The 1999 AASHTO Bicycle Guide only briefly mentions that rest areas may be appropriate “on long, uninterrupted shared use paths.” [1999 AASHTO Bicycle Guide, p. 68, Additional Bicycle Amenities ¶ 1)
  - G.3. King County proposes to add 10 park benches along the Trail; the two park benches removed in the demolition phase will be relocated. Five trash receptacles will be added; the two trash receptacles removed in the demolition phase will be relocated. The one water fountain removed in the demolition phase will be relocated. (Exhibit 6)
- H. Recommendations
  - H.1. The City prepared separate Staff Reports and Recommendations for each of the three permits involved in this consolidated proceeding: The CUP (Exhibit 57); the PAUE (Exhibit 58); and the SSDP (Exhibit 59).
  - H.2. The City initially recommended approval of the CUP subject to 11 conditions. (Exhibit 57, pp. 22 and 23) The City and County jointly presented a revised list of conditions at hearing which significantly changed Recommended CUP Condition 2 and deleted Recommended CUP Condition 4. (Exhibit 116) Exhibit 116 rennumbers the conditions from 4 on. Recommended CUP Condition numbers used herein are based on Exhibit 116 unless expressly stated otherwise.

King County objects in part to Recommended CUP Condition 6 which requires acquisition of a PAUE for certain activities: The County argues that a PAUE is not required for work in wetlands or in buffers for wetlands and streams. (Exhibits: 29; 34; 86, pp. 10 – 14; and 130, FN 1) King County objects to Recommended CUP Condition 9 in its entirety. The City discusses its justification for this

condition in Exhibit 57 (pp. 20 and 21) and, more extensively, in Exhibit 129 (pp. 9 – 17).<sup>62</sup> King County presents argument against Recommended CUP Condition 9 in Exhibit 130.

- H.3. The City initially recommended approval of the PAUE subject to five multi-part conditions, one part for each type of sensitive area which the City believes requires a PAUE: Tree removal; landslide hazard areas; steep slope hazard areas; wetlands and buffers; and stream buffers. (Exhibit 58, pp. 8 and 38<sup>63</sup>) The City and County jointly presented a restated list of conditions at hearing which significantly changed PAUE Recommended Conditions 1, 2.b, and 3.b.<sup>64</sup> (Exhibit 117)

As noted in Finding of Fact H.2, ¶ 2, above, King County argues that a PAUE is not required for work in wetlands or in buffers for wetlands and streams. (Exhibits 29, 34, and 86, pp. 10 – 14) Therefore, King County objects to PAUE Recommended Conditions 4 and 5 which cover those two topical areas.

- H.4. The City recommends approval of the SSDP subject to no express conditions, but subject to two implied conditions.<sup>65</sup> (Exhibit 59) King County has provided an analysis on SSDP review criteria. (Exhibit 28)

King County takes no exception to the City's recommendation on the SSDP. (Exhibit 130, FN 5)

King County correctly characterizes the SSDP portion of the process in Exhibit 130 at Footnote 5: "The County's application for a shoreline substantial development permit (SSDP) has proved uncontroversial: It was not addressed in any detail by either party, the Hearing Examiner, or any citizen in either of the hearings."

- H.5.<sup>66</sup> Significant public interest in Trail redevelopment exists, reflected in the level of participation in this permit process. Numerous expressions of public interest have been offered in the form of exhibits (Exhibits 41 – 56, 60, 61, 84, 85, 88 – 96, 99 – 103, 105 – 108, 113 – 115, 119, 120, 123 – 125, and 127) and testimony (witnesses listed above).

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<sup>62</sup> King County perceives the latter City discussion to constitute a recommendation for an additional CUP condition. (Exhibit 130, p. 3, ll. 6 – 12) The Examiner does not see that discussion as a recommendation for an additional condition. Rather, the Examiner interprets it as argument in support of CUP Recommended Condition 9.

<sup>63</sup> The City testified that the summary of recommended conditions on p. 38 inadvertently omitted Condition (c), found on p. 8, from summary Condition 1. That omission was corrected in Exhibit 116.

<sup>64</sup> The PAUE Recommended Conditions are labeled as "SA-1," "SA-2," etc. in Exhibit 116. Exhibit 130 uses that same format. The Examiner declines to use that format, preferring to use the basic numbering contained in Exhibit 58.

<sup>65</sup> The recommendation reads "Approval of this permit [is] recommended with conditions noted above." (Exhibit 59, p. 9) A sentence on page 4, § C, ¶ 3 reads "Approval of the SMP should be conditioned on approval of the LFP Land Clearing, Grading, and Excavation Permit." That condition is mentioned again on page 6 in § A. The last sentence on page 7 reads "Once a permit from the US Army Corps of Engineers is issued for this project, compliance with requirement E, 1, above will be met." [*sic*; underlining omitted] The Examiner construes that sentence to be a second recommended condition.

<sup>66</sup> Last paragraph revised after reconsideration.

Essentially, no one has opposed the Trail redevelopment outright. Even the most vigorous proponents of something different than that proposed do not object to improving the Trail. Some do argue that King County should have chosen the FEIS’s “rebuild” alternative in which the Trail surface would be rebuilt without widening.

Other citizen viewpoints fall into several basic categories. One group, composed of both City and non-City residents, fully supports King County’s proposal. Some perceive that the City has tried to block the project and ask that delaying tactics cease.

Another group believes that environmental studies performed to date have been incomplete and/or inadequate. They want the City’s decision delayed until additional studies have been done.

Another group, composed primarily, if not exclusively, of City residents whose homes are accessed at one of the eight Trail crossings located south of NE 165<sup>th</sup> Street, strongly oppose King County’s proposal to increase the posted speed limit through that area and to reverse crossing priority.

Finally, City residents who are members of and/or use the Sheridan Beach Club via the NE 165<sup>th</sup> Street crossing opposed King County’s original plan to grant Trail traffic priority at that crossing, but now support the current commitment to use an all-way STOP configuration at NE 165<sup>th</sup> Street under which both street traffic and Trail traffic will be required to stop at the crossing.

I.<sup>67</sup> Reconsideration

- I.1. Two parties of record filed timely Requests for Reconsideration: Wagar and King County. (Exhibits 134 and 135) Wagar seeks reconsideration of Finding of Fact D.9 and Conclusion of Law K.5.I (bicycle stopping distance), Condition 9 (speed limit), hours of operation, and a few technical points. Wagar correctly points out the error in the Examiner’s prior statement of bicycle stopping distance. That error has been addressed in the Findings in Section D, above. Wagar also argues that Condition 9, which reduced the speed limit between Sta. 0+00 to 35+50 to 10 mph, is not appropriate. Wagar also argues that the Trail should be open longer than between one-half hour before sunrise to one-half hour after sunset. (The original Decision did not impose any hours of operation.)

King County supports Wagar’s position on speed limit. (Exhibit 150, p. 1) While King County sympathizes with Wagar’s argument regarding hours of operation, it notes that current County Code controls and limits all park hours to those stated above. (Exhibit 150, pp. 1 and 2)

- I.2. King County seeks reconsideration of Conditions 4 (“trench drains”), 10 (YIELD sign control), and 11 (“rumble strips”) and Findings of Fact/Conclusions of Law associated therewith. King County argues that Condition 4 is so broadly written as to be construed to apply to all crossings, whether

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<sup>67</sup> Section added after reconsideration.

impacted by the Trail redevelopment or not. (Exhibit 134, pp. 2 – 7) King County argues that giving priority to the lower-volume crossing traffic and controlling Trail traffic with YIELD signs at Crossings 1 – 8 is contrary to the MUTCD and is an impermissible collateral attack on the FEIS. (Exhibit 135, pp. 7 – 15) Finally, King County asks that Condition 11, which requires a second set of “rumble strips,” be deleted because it believes the Examiner required them based upon a misunderstanding of their purpose. (Exhibit 135, pp. 15 – 20)

Wagar supports retention of the YIELD Trail control in Condition 10 and concurs with King County’s position regarding elimination of Condition 11. (Exhibit 137)

- I.3. The City hired a licensed civil engineer who is a Fellow of the Institute of Transportation Engineers to review and comment upon traffic aspects of the original Decision and the Requests for Reconsideration (Exhibits 152, 153, and 153A); the City used the services of the licensed civil engineer who had provided consulting services to the City for the Trail redevelopment proposal to review and comment upon drainage aspects of the Requests for Reconsideration (Exhibits 152 and 155) The City’s positions on the Requests for reconsideration are based upon those reviews.

In summary, the City contends Condition 4 is properly justified, Condition 9 may be deleted if the City’s recommendations regarding Condition 10 are implemented, Condition 10 is justified by the MUTCD and local conditions but that some changes to crossing signage should be imposed, and Condition 11 is unnecessary. (Exhibits 152 – 155)

- I.4. Citizen comments to the Requests for Reconsideration generally support Conditions 4, 9, and 10. Several emphasize and provide additional examples of the unique, constraining geometric conditions at Crossings 1 – 8. (Exhibits 138, 142 – 145) One citizen commenter opposes Condition 10. (Exhibit 146) The CBC supports King County’s position on Conditions 10 and 11 and supports Wagar’s position on Condition 9. (Exhibit 147)

## LEGAL FRAMEWORK<sup>68</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

Both a CUP and an SSDP are Type I applications, subject to an open record hearing before the Examiner who makes a final decision on the application subject to the right of reconsideration and appeal. CUP decisions are appealable to Superior Court; SSDP decisions are appealable to the State Shorelines Hearings Board. [LFPMC 16.26.030(A)(1), .100, and .110; Hearing Examiner Rule of Procedure 504; and Chapter 90.58 RCW]

A Type I application that complies with the applicable decision criteria shall be approved; provided, that the examiner may modify or condition a proposal to ensure conformity with the relevant decision criteria.

[LFPMC 16.26.110(A)]

A PAUE is within the Examiner's jurisdiction pursuant to LFPMC 16.16.260(C), but is not expressly "Typed" by LFPMC 16.26.030. A Reasonable Use Exception under LFPMC 16.16.250 is classified as a Type I application. [LFPMC 16.16.030(A)(8)] Given the similarity between the two types of actions and the similarity in code language between LFPMC 16.16.250 and 16.16.260, the Examiner processes a PAUE request as a Type I application appealable to Superior Court.

### Review Criteria

The review criteria for a CUP are set out at LFPMC 18.54.030:

A conditional use may be authorized upon a finding that the proposal conforms to specific development criteria established for that use, if any, and that it meets the following minimum criteria:

- A. The proposed use is consistent with the policies and goals of the comprehensive plan;
- B. The proposed use is not materially detrimental to other property in the neighborhood;
- C. The proposed use will supply goods or services that will satisfy a need of the community;
- D. The proposed use is designed in a manner which is compatible with the character and appearance with the existing or proposed development in the vicinity of the subject property;

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Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

E. The proposed use is designed in a manner that is compatible with the physical characteristics of the subject property;

F. Any requested modifications to the standards of the underlying zone shall require a variance and be subject to mitigation to minimize or remove any impacts from the modification;

G. The proposed use is not in conflict with the health and safety of the community;

H. The proposed use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;

I. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities;

J. The applicant's past performance regarding compliance with permit requirements and conditions of any previously issued land use permit including building permits, conditional uses or variances, shall be considered before approving any new permit.

Additional criteria set forth at LFPMC 18.54.047 apply to “multi-use” and “multi-purpose” trails:<sup>69</sup>

A multi-use or multi-purpose trail facility may be allowed, added to or altered as a conditional use in any land use zone of the city. In granting such conditional use, the hearing examiner is instructed to attach appropriate conditions such as, but not limited to, the following: limitation of size, location on property and screening and to only issue conditional use permits conditioned upon compliance with any requirements provided under Chapter 18.54.

The review criteria for a PAUE are set out at LFPMC 16.16.260(C):

1. There is no other practical alternative to the proposed development with less impact on the sensitive areas;

2. The application of this chapter would unreasonably restrict the ability to provide utility services to the public;

3. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;

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<sup>69</sup> Section 18.54.047 was initially enacted by Ordinance No. 909 in October, 2005, was subsequently amended/expanded by Ordinance No. 951 in 2006, was reaffirmed by Ordinance No. 958 in 2007, and was invalidated by the CPSGMHB in *Cascade Bicycle*. (See Finding of Fact A.3, above.) The text quoted herein is that enacted by Ordinance No. 909 and may be found in Exhibit 86K-1 at page 5. (Published and on-line versions of the LFPMC still include the invalidated amendments.)

4. The proposal attempts to protect and mitigate impacts to the sensitive area functions and values consistent with the best available science with the objective of no net loss of critical area functions and values; and
5. The proposal is consistent with other applicable regulations and standards.

The City adopted King County's Shoreline Master Program (KCSMP) and the implementing portions of the King County Code (KCC), Title 25, when it annexed the area in which the subject site is located. While the City is in the process of obtaining state approval of its own SMP, it still uses the KCSMP and Title 25 KCC. An SSDP must comply with the policies of the SMA and the KCSMP. [KCC 25.32.010] Applicable regulations are Urban Environment: General requirements [KCC 25.16.030]; Signs [KCC 25.16.080]; Excavation, dredging and filling [KCC 25.16.190]; and Recreation [KCC 25.16.200].

The Local Project Review Act [Chapter 36.70B RCW] establishes a mandatory "consistency" review for "project permits", a term defined by the Act to include "building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan". [RCW 36.70B.020(4)]

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

- (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
- (b) Density of residential development in urban growth areas; and
- (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

#### Vested Rights

The vested rights doctrine applies to CUP and SSDP applications:



“Washington does adhere to the minority rule that a landowner obtains a vested right to develop land when he or she makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application. Our vested rights rule also has been applied to building permits, conditional use permits, a grading permit, and a [shoreline management] substantial development permit.”

[*Norco Construction v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982), citations omitted]

Therefore, the CUP and SSDP applications are vested to the regulations as they existed on December 4 and December 17, 2007, respectively.<sup>70</sup>

#### Standard of Review

The standard of review is preponderance of the evidence. The Applicant has the burden of proof. [LFPMC 16.26.100(C)]

### **CONCLUSIONS OF LAW**

#### A. Summary and Legal Arguments

A.1.<sup>71</sup> Any argument that the environmental impacts of the proposed Burke-Gilman Trail redevelopment have not been adequately assessed is untimely and beyond the scope of consideration in this consolidated proceeding. Subsection 197-11-680(4)(d) provides, *inter alia*, that

If the proposal requires more than one governmental decision that will be supported by the same SEPA documents, then RCW 43.21C.080 still only allows one judicial appeal of procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision.

(Underlining added) The deadline for challenges of the environmental review of this proposal was August 1, 2008. (Exhibit 83) Arguments which challenge the adequacy of the environmental documentation and review are collateral attacks on the adequacy of the FEIS. Such collateral attacks cannot and will not be considered. The argument that certain amphibians have not been adequately evaluated in the review process is just such an attack; it will not be considered. The argument that the wetlands along the trail were inadequately delineated is just such an attack; it will not be considered.

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<sup>70</sup> The City Council enacted major revisions to Chapter 16.14 LFPMC, Tree Protection and Replacement, under Ordinance No. 990, November 20, 2008. Those changes have a sunset date of June 30, 2009. [Ord. No. 990, § 3] None of the changes enacted through Ordinance No. 990 apply to this application: The application was vested prior to the effective date of the ordinance.

<sup>71</sup> Conclusion revised (additional paragraph added) after reconsideration.

Analysis of proposed traffic control measures on the Trail and imposition of conditions which would change such controls from that proposed by King County are not impermissible collateral attacks on the FEIS. The “FEIS did not analyze the safety of the streets and crossings.” (Exhibit 152, p. 15, l. 19) The FEIS states “that final facility design should reflect specific local site conditions, anticipated use, and sound engineering judgment. The permitting process will include review of the project’s consistency with the intent and specific provisions of AASHTO, MUTCD and King County guidelines.” (Exhibit 22, Comment Letter G-2, Response ¶ 35) This is precisely the time that King County intended that such matters be addressed. Further, a finding of no significant, adverse environmental impact does not mean that a proposal meets all requirements for issuance of a local permit. (Exhibit 152, p. 16, ll. 11 – 22)

- A.2. *Cascade Bicycle* is not, *per se* the “law of the case.” *Cascade Bicycle* challenged a legislative enactment by the City Council. The proceeding now before the Examiner is a quasi-judicial process seeking approval of three permits/approvals. The Examiner must apply the LFPMP as it now exists (without the amendments that were contained in Ordinance No. 951).

The Examiner is guided in determining the extent of permit conditioning allowed on an EPF proposal by the Court of Appeals’ holding in *Des Moines*. To paraphrase that holding, King County “will have to comply with [Lake Forest Park’s] reasonable permitting and mitigation requirements. The fact that these requirements may make the [redevelopment of the Burke-Gilman Trail] more costly does not relieve [King County] of these obligations.” [*Des Moines* at 843, paraphrased]

- A.3. *Cascade Bicycle* is consistent with *Des Moines* when it says that when the proponent of a regional EPF selects an alternative to implement, “the city has a duty to accommodate the [EPF]”. Discussion of alternatives is no longer appropriate. King County selected the redevelopment alternative on July 2, 2008. The record in this proceeding contains no indication of any challenge or appeal of that action. (Finding of Fact A.4, above.) As with analogous challenges to the FEIS adequacy, the argument that the Examiner should consider alternative courses of action which King County could take amounts to an impermissible collateral attack on the County’s alternative selection. Such a collateral attack cannot and will not be considered.
- A.4. The City and King County disagree as to the scope of what requires a PAUE. The City’s position is that a PAUE is required for: Removal of trees within steep slopes, wetlands and wetland buffers, and stream buffers; alteration of 4,350 linear feet of steep slopes in a landslide hazard area between Sta. 0+00 and 45+50; use of impervious pavement in a landslide hazard area along that same section of trail; increase in peak surface water flows in a landslide hazard area from that same section of trail; less than the 25 foot minimum buffer for a steep slope hazard area along that same section of trail; use of impervious pavement in a steep slope hazard area along that same section of trail; alteration of 4,350 linear feet of steep slopes in a steep slope hazard area along that same section of trail; increase in peak surface water flows in a steep slope hazard area from that same section of trail; wetland fill and buffer reduction beyond administrative approval authority; and stream buffer reduction beyond administrative approval authority. (Exhibit 58)

King County applied for a PAUE for all of the above items under protest. (Exhibit 34) King County argues that no PAUE is required for the proposed alterations to wetlands, streams and their buffers. (Exhibits 29 and 86)

- A.5. The PAUE extent dispute centers around two code provisions: LFPMC 16.16.330(A) and 16.16.350(G)(1).

Section 16.16.330(A) LFPMC reads as follows:

Exceptions to the wetlands requirements may be allowed only if it is determined by the planning director that the development site proposal will enhance or protect the wildlife habitat, natural drainage or other functions and will be consistent with the purposes of this chapter.

Section 16.16.350(G)(1) reads as follows:

The planning director may reduce the standard buffer to no less than the minimum buffer allowed by subsection A of this section, whenever, in the judgment of the planning director, a smaller width is adequate to protect the stream and habitat functions and the development proposal will result in a net improvement of stream and buffer functions.

- A.6. The City argues that since the “goals and objectives” of the Trail redevelopment “are not to enhance or protect the wildlife habitat, natural drainage or other functions of the wetlands at the site”, a PAUE is required for work in wetlands and their buffers. In a parallel fashion, the City argues that since Trail redevelopment “work proposed in the stream buffer is not being requested to protect or enhance the stream and habitat functions, but to accommodate the widening”, a PAUE is required for work in the stream buffers. (Exhibit 29, Attachment pp. 5 & 6)

The County counters that

[t]he purpose (i.e. intent, or goals or objectives) of a development proposal is irrelevant under -.330.A; the only question that matters under -.330.A is whether the proposal (no matter its purpose or goals and objectives) will have the effect of “enhanc[ing]” or “protect[ing]” the wetland functions and otherwise be consistent with the purposes of LFPMC Ch. 16.16 in terms of protecting sensitive areas.

(Exhibit 29, p. 5, underlining in original; See also Exhibit 86, pp. 10 – 14)

- A.7. City ordinances are subject to the same rules of interpretation and construction as apply to statutes. [*Tahoma Audubon Soc. v. Park Junction Partners*, 128 Wn. App. 671, 116 P.3d 1046 (2005);

*Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997)] Courts, and by extension quasi-judicial decision makers, “do not construe a statute that is clear and unambiguous on its face. We assume that the legislature means exactly what it says, and we give words their plain and ordinary meaning. Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.” [*Ockerman v. King Cy.*, 102 Wn. App. 212, \_\_\_ P.2<sup>nd</sup> \_\_\_ (Div. I, 2000); see also: *Western Petroleum v. Freidt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995), holding that intent is relevant only if ambiguity exists in the language of the code; *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000), holding that clear and unambiguous codes are not subject to judicial construction] Legislative history cannot override an unambiguous code provision. [*Kirtley v. State*, 49 Wn. App. 894, 898, 748 P.2d 1148 (1987)] The use of different terms within a legislative enactment evidences a difference in intent. [*Cazzanigi v. General Electric Credit*, 132 Wn. 2d 433, 446, 938 P.2d 819 (1997)] Intent is determined “from the statutory context as a whole.” [*Peacock v. Public Disclosure Commission*, 84 Wn. App. 282, 287, 928 P.2d 427 (1996)]

- A.8. King County’s interpretation of LFPMC 16.16.330(A) and .350(G)(1) is correct. Neither code section refers to “goals and objectives” nor purpose. On the contrary, the plain language of both sections simply speaks to the results that would flow from a proposal, not the purpose for which a proposal is presented. Both sections allow the Planning Director to approve SAWP applications where the project, whatever its purpose may be, will: “enhance or protect the wildlife habitat, natural drainage or other functions and will be consistent with the purposes of this chapter” in the case of LFPMC 16.16.330(A); and result in “a net improvement of stream and buffer functions” in the case of LFPMC 16.16.350(G)(1).
- A.9. King County does not need a PAUE for impacts to wetlands; the range of exceptions needed by King County is within the scope of the Planning Director’s authority to grant. That portion of the application must be remanded to the Planning Department for consideration within the context of the pending SAWP application.

King County does not need a PAUE for all Trail impacts to stream buffers. The Trail crosses McAleer Creek; the Trail crosses and then parallels for a distance Lyon Creek. (Exhibit 32, Sheets W3.5 and W3.7) The McAleer Creek crossing is not subject to LFPMC 16.16.350(G)(1) at all. Rather, as a simple stream crossing, it is subject to LFPMC 16.16.360(G). By expressly allowing crossings of streams, the code expressly allows the thing crossing the stream, in this case the Trail, to pass through the buffer on each side of the stream to make the crossing. Any other reading would be illogical. Consideration of compliance with the subparts of LFPMC 16.16.360(G) lies within the Planning Director’s authority under a SAWP application. That portion of the application must be remanded to the Planning Department for consideration within the context of the pending SAWP application.

Lyon Creek presents a different set of circumstances. The Trail crossing of the creek is governed by LFPMC 16.16.360(G) just as is the McAleer Creek crossing. But after crossing the creek, the Trail runs roughly parallel with Lyon Creek for about 260 feet. Since the widening will (apparently) bring

the Trail a little closer to Lyon Creek in that area, LFPMC 16.16.350(G)(1) comes into play. Subsection 16.16.350(G)(1) LFPMC allows the Planning Director to grant stream buffer reductions, but not below the minimums set by LFPMC 16.16.350(A). The minimum buffer width for a Type 1 stream is 70 feet. The Trail will be as close as five feet from the near creek bank. (Exhibit 32, Sheet W3.7, Sta. 79+60) The Planning Director is not authorized to grant that great an exception. Therefore, a PAUE is required for work in the Lyon Creek buffer.

- A.10. If the Trail were being paved with a pervious material that did not contribute to surface water runoff (which as a practical matter would do no good anyway as the railbed beneath the Trail is impervious), it could be allowed administratively in both steep slope hazard and landslide hazard areas by the Planning Director under a SAWP. Subsection 16.16.310(B)(2) LFPMC expressly allows trails with pervious surfaces in steep slope hazard areas. Subsection 16.16.290(D)(1) LFPMC allows alteration within landslide hazard areas “if the alteration meets the standards and limitations established for steep slope hazard areas”.

Therefore, a PAUE is required only because the Trail will not be surfaced with pervious material. It is that provision of the EnvSA regulations for which King County requires a PAUE. If the Trail were pervious, it would be expressly allowed under the SAWP process.

- A.11. The LFPMC 16.16.230(G)(1) prohibition against tree removal in sensitive areas is not absolute. Subsection 16.16.310(B)(1) LFPMC allows surface water conveyances in steep slope hazard areas if “installed in a manner to minimize disturbance of the slope and vegetation” (Emphasis added); minimizing is not prohibiting. Subsection 16.16.310(B)(1) LFPMC allows utility corridors in steep slope hazard areas; a utility corridor could not be established on a wooded hillside without tree removal. Common sense says that if those two uses can remove trees, then a trail, allowed in the same code subsection, must be able to remove trees for its construction. Further, LFPMC 16.16.360(G) allows construction of stream crossings and LFPMC 16.16.330(G) allows construction of wetland crossings. Those express allowances carry with them the expectation that trees may have to be removed, not only in the sensitive area but in the buffers around it (since one cannot reach the sensitive area without first passing through its buffer). Sewer utility corridors may cross through wetland buffers so long as they “avoid cutting trees greater than 12 inches in diameter when possible”. [LFPMC 16.16.330(B)(4), emphasis added] Even the requirement to “avoid” is not absolute. Wetlands may be filled under authority of LFPMC 16.16.340(G). If a forested wetland is filled, it stands to reason that the trees within that wetland would be removed first.

That being the case, a PAUE is not required for tree removal in steep slope hazard areas, stream buffers associated with a trail for which a PAUE or SAWP has been issued, or wetlands which have been authorized to be filled or crossed.<sup>72</sup>

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<sup>72</sup> Exhibit 58, p. 5, cites Exhibit 25 for the proposition that five trees are to be removed from “Wetland and Wetland Buffer.” Exhibit 25 depicts steep slope, landslide, and erosion hazard areas; it does not depict wetlands or wetland

- A.12. The peak flow increase provision in LFPMC 16.16.290(D)(2)(d) (cited in Exhibit 58, especially on page 15) applies by its own language only to “slopes of less than 40 percent”. Since all the steep slopes along the Trail are steeper than 40% (See Exhibit 25.), that provision has absolutely no applicability.
- A.13. In summary, King County requires a PAUE for Lyon Creek stream buffer reduction below the established minimum and for surfacing an otherwise allowed trail with impervious materials. It does not need a PAUE for all the items listed in Exhibit 58 as enumerated in Conclusion of Law A.4, above.
- A.14. King County correctly notes that “Under the [LFPMC], the proper sequence is to first demonstrate compliance with the CUP criteria, then issue a permit, incorporating reasonable conditions and mitigation to address any identified impacts. LFPMC 16.26.040.B.3 [*sic*]; LFPMC 16.26.080(A).” (Exhibit 130, p. 11, ll. 16 – 19)

It would be inappropriate and a dereliction of duty for an Examiner to approve a permit – any permit – to which was attached a condition requiring that some administrative entity make a post-permit-issuance determination of whether some aspect of the then-approved project met required criteria and, if it didn’t, to make a list of actions that might correct the deficiency at some unknown or unstated time in the future, if someone chose to implement them.

- A.15.<sup>73</sup> King County is correct when it argues in Exhibit 130 that conditions may not be imposed on a permit to correct existing problems neither created by nor exacerbated by a proposed project.
- A.16. The Examiner is not obligated to agree entirely with City Staff’s conclusions on this or any other permit. Were there such a requirement, the hearing process would be a mockery and a waste of time: Regardless what was said or presented at hearing, the Examiner would be obligated to reach the same conclusion as did the Staff in its preparation for the hearing. The illogic of such a position is obvious and will not be further dwelled upon. The Examiner is required to independently evaluate the testimony and evidence to reach whatever conclusions he finds justified under the law.
- A.17. The Trail redevelopment proposal passes the “consistency” test: A public trail is a listed Conditional Use in the applicable zone; density is irrelevant as this is a non-residential project; and additional public utility services are not required.
- A.18. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

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buffers. Exhibit 32 depicts wetlands and their buffers and also shows trees that are expected to be removed. No trees to be removed are located within wetlands; 14 are shown for removal from wetland buffers.

B. Widening

- B.1. A 12 foot wide paved trail surface with a total of four feet of shoulder is generally consistent with established guidelines and is about the best one can achieve given the severe topographic, geologic, and developmental constraints adjacent to and within the Trail right-of-way. A separated pedestrian path (as recommended in the 2004 King County Guidelines) is simply impossible (not just impracticable) here because of the physical constraints. A condition which required a wider paved trail or a separated pedestrian path would be tantamount to denial of the requested permits. No such condition can be imposed because the Burke-Gilman Trail is a regional EPF.
- B.2. Further, any wider trail section would increase disturbance of landslide prone slopes and/or encroach onto more of the downslope lanes and residences.

C. Cross Slope and Drainage

- C.1. A single-direction trail cross-slope is fully consistent with all guidance documents.
- C.2. King County's logic in sloping the trail towards the east is persuasive. The redeveloped trail, including the two shoulders, will be nominally six feet (60%) wider than the current trail. The drainage ditches along the west side of the trail prevent lowering of the west edge of the trail. Thus, a cross-slope towards the west would of necessity raise the east edge. Raising the east edge would necessitate installation of more retaining walls, thus creating a greater visual (and probably in some cases practical) impact on downslope properties.
- C.3. Changing the trail's cross-slope will reduce flows into the drainage ditches along the west edge of the Trail. That, in turn, will reduce flows through the various channels which convey that water into Lake Washington. To the extent that nuisance drainage problems presently exist associated with those conveyance channels, Trail redevelopment will, if anything, reduce them.
- C.4. Compliance with the 2005 Design Manual, including exceptions and exemptions contained therein for which the proposal qualifies, constitutes acceptable control of surface water runoff. The 2005 Design Manual is the standard adopted by the City.
- C.5. The proposal is exempt from the 2005 Design Manual's flow control facility requirement in all TDAs except McAleer Creek (where a variance has been approved). Since this is a transportation project within a right-of-way, application of flow control BMPs is optional. Therefore, all the discussion and argument during the hearing about the lack of 10 feet of vegetated surface downslope of the Trail in some areas was effectively moot: The proposal would meet the 2005 Design Manual's requirements without application of any flow control BMPs. The County is voluntarily making use of every available area for dispersion of the sheet flow runoff from the trail surface. Nothing more can be required under the 2005 Design Manual.

- C.6. Recommended CUP Condition 2, as amended by Exhibit 116, is an effective compromise to address runoff concerns in the southern portion of the Trail (between Sta. 0+00 – 11+50 and 17+00 – 33+00). Even though the proposed condition calls for a study whose outcome cannot be known in advance and possible implementation of actions which cannot be known in advance either, it is acceptable as both the study and the implementation measures are required to follow the City's adopted standards for surface water control, the 2005 Design Manual. This is not a situation where potential corrective measures would be too vague to be understood nor where correction is left up in the air.
- C.7.<sup>74</sup> Recommended CUP Condition 3, as amended by Exhibit 116 (Condition 4 in the Examiner's original Decision), is justified if certain conditions exist. King County cannot be required to correct existing, inadequate drainage conditions unless its proposal will exacerbate them. King County's proposal includes reversing the Trail's cross-slope: From sloping westerly towards the uphill slope to sloping easterly away from the uphill slope. If the Trail presently slopes towards the west at any of the crossings, then the Trail itself serves as a drainage control device which forces surface water flowing down the crossing street(s) into the upslope ditches. To the extent that condition exists, changing the cross-slope will remove that drainage control and increase flows downslope on the crossing's surface, thus exacerbating downslope drainage conditions. Further, if King County has to remove an existing drainage control feature in order to construct its project, then it must replace that feature with one which complies with current City requirements: It cannot install an impermissible control. The City has convincingly shown that berms across a street are not an acceptable form of drainage control. (Exhibit 155) Condition 4 in the Examiner's original Decision simply used Recommended CUP Condition 3 verbatim. Condition 4 needs to be revised to clarify that it applies only where the redevelopment will alter existing drainage controls at the crossings.
- D. Traffic Controls
- D.1.<sup>75</sup> As stated in Conclusion of Law A.15, above, conditions may not be imposed on a permit to correct existing problems neither created by nor exacerbated by a proposed project. King County is wrong, however, to assert that its Trail redevelopment will not alter any of the traffic shortcomings of the current trail.

First, the proposal will eliminate all chicanes between Sta. 0+00 and 55+00. Those chicanes, most of which occur in pairs on either side of a trail crossing point, serve to force bicyclists on the Trail to slow down. Their existence means that bicyclists of necessity pass through the intersections "guarded" by the chicanes more carefully as they have to negotiate a pair of tightly spaced curves on each side of the crossing. With the chicanes gone, cyclist speed will not need to be reduced and the speed with which they pass through the intersection will assuredly increase. (If it wouldn't, why would they be arguing for their removal?) That fact in and of itself alters the intersection equation.

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<sup>74</sup> Conclusion added after reconsideration.

<sup>75</sup> Conclusion revised after reconsideration.



Secondly, the widening (approximately 60% wider including the two travel shoulders) will of necessity reduce the length of the tangent sections at virtually every crossing south of NE 165<sup>th</sup> Street (Crossings 1 – 8). That alteration changes the geometry of the intersections and will make it harder for motorists to see what's coming on the Trail. In fact, with some of the tangent sections down to next to nothing, it will be extremely difficult for motorists to see down the Trail.

Third, the widening places the Trail closer to the Tracy residence garage, thus exacerbating the already bad sight distance situation at that location.

Those are real changes to the Trail which cause real changes in Trail impacts. Reasonable conditions to mitigate or ameliorate those changes are completely justifiable.

- D.2.<sup>76</sup> The westbound trail approaches are more constrained than the eastbound approaches: The tangent sections are, almost without exception, shorter than on the west side of the Trail. After the widening, some crossings will have virtually no tangent section on the east side. King County's assertion that every crossing occurs at nearly a right angle omits the reality that without significant tangent sections at the approaches, a vehicle, regardless of what type, will not be able to make a right angle approach to the Trail. Sight distance will be severely compromised. The redevelopment will make the situation worse.

Motorists approaching the east side of the NE 153<sup>rd</sup> Street crossing (Crossing 3) from the south and approaching the east side of the NE 157<sup>th</sup> Street crossing (Crossing 8) from either the north or the south have another impediment to overcome: Their approach rises about six feet in the final 25 – 30 feet before the crossing. (Exhibit 27) Since they will have virtually no tangent section after the Trail is widened, they will be in a sharply angled, tail-down position when they get to the crossing. That situation is all the worse because of the widening of the trail. The redevelopment will make the situation at those locations worse.

- D.3.<sup>77</sup> If the Trail is to have priority at Crossings 1 - 8, then ESD is a very critical measurement at each of those crossings. If the Trail has priority, then its users (bicyclists are the critical users in this situation) will have absolutely no legal obligation to slow down when approaching Crossings 1 – 8; the onus for avoiding collisions would be upon motorists on the crossing streets/driveways. Motorists who would be required to stop or yield before crossing would have to be able to see far enough down the Trail to decide whether they could safely cross in front of oncoming bicycle traffic. That sight distance is exactly what ESD measures.

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<sup>76</sup> Second paragraph revised after reconsideration.

<sup>77</sup> Original Conclusion replaced with new Conclusion after reconsideration.

Given the geometry of Crossings 1 – 8, the City’s estimate of crossing speed (3 mph) in Exhibit 153 is far more credible than Transpo’s estimate of crossing speed (25 mph) in Exhibit 153B. (Transpo’s estimate has the effect of greatly reducing ESD at the expense of being realistic. Their calculation is not at all “conservative;” the City’s calculation is “conservative” from the perspective of user safety.) Therefore, ESD for Crossings 1 – 8 is about 320 feet, not the 180 feet Transpo calculated. All evidence indicates that such a sight distance is simply unavailable at Crossings 1 – 8. Therefore, assigning crossing priority to the Trail is inconsistent with sound engineering judgment as ESD, which is necessary for safe operation of the crossings in that mode, cannot be met.

If, on the other hand, the street/driveway crossings are given priority, then ESD is not nearly as critical. Trail users have SSD to crossing traffic and can safely stop if they see an object in or entering a crossing ahead of them.

- D.4.<sup>78</sup> None of the guides used by King County mandate that trail users must have the right of way at unsignalized trail crossings. King County has continuously said that the various guides require that the Trail have the priority at crossings because it has the greatest volume. At no time, however, has it ever provided a specific citation to support that assertion. This is not to say that the several guides do not indicate that volume is a consideration; they do. But they also say it is not the only consideration.

The guides are, for the most part, just that: Guides. They go out of their way to remind the reader that they are not rigid standards. Even the MUTCD does not set rigid standards for when a control is to be used – except where signal warrants must be met. The MUTCD’s Standards regulate how a control is displayed and used, not when it is displayed. All of the guides cite numerous considerations and ask the user to apply them with consideration.

- D.5. The argument that speed limit signs are not used to control speed is without substantial merit. King County suggests that speed limit signs have to closely match the 85<sup>th</sup> percentile speed or else they will not be respected by bicyclists. Were that the logic used in setting highway speed limits, the limit on I-5 between Seattle and Everett would be at least 70 mph – the limit that exists on the more rural sections well north of Everett. Every adult reader has certainly experienced entire platoons of vehicles traveling on I-5 at 70 mph or more. That notwithstanding, the state does not raise the speed limit because it does not believe that higher speeds are safe in congested urban areas. Another example is the slower speeds required in school crossing zones. Typically there is no physical change in the street near a school. It just happens to pass a school. Officials have decided that for safety reasons motorists should slow down as they pass the school. That is precisely the use of speed limit signs to slow vehicles down below the 85<sup>th</sup> percentile speed that would exist without them.

The guidelines say that STOP signs should not be used to try to control speed. They do not say that speed limit signs are not used to control speed.

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<sup>78</sup> Second paragraph revised after reconsideration.

- D.6.<sup>79</sup> King County’s argument that trail speed limits must be consistent from one end of the trail to the other is disingenuous and ignores differences in trail conditions. Just as highway speed limits are altered based upon local conditions (consider I-5 and school zones), so too should trail speed limits reflect local conditions. A speed that is perfectly safe in an area without significant crossings and obstructions, is not necessarily safe in a congested area.

King County’s own witness described this as a “constrained corridor.” That description is very apt, especially in the area south of NE 165<sup>th</sup> Street. Eight crossings occur in that area, several in tight clumps. And the visibility at those crossings, even accounting for the vegetation trimming that King County proposes to perform, will be less than ideal. This is not an open road area. It is not realistic to assume that it is.

Subsection 7.12.295(A) KCC does not set a mandatory speed limit for every King County trail. Rather, it sets an upper limit beyond which no trail user is to go. (It is of more than passing interest that the present 85<sup>th</sup> percentile speed on the Burke-Gilman Trail exceeds the maximum ever to be allowed on any King County trail – and that is without any widening or chicane removal or crossing priority change. The present average speed is hardly more than 1 mph below the maximum allowed speed. Increasing travel speed on the Burke-Gilman Trail is completely unnecessary and cannot be a legitimate goal of the redevelopment project – more than 15% of Burke-Gilman Trail bicyclists are already breaking the King County Code regulation.) King County is not prevented by KCC 7.12.295(A) from setting a lower speed in congested or troublesome areas.

If the default 15 mph speed limit is to be allowed through this congested area, special considerations for the safety of both Trail users and crossings users must be applied. Ignoring the reality of the nature of this area is simply not a viable option.

- D.7. The standard residential area trip generation factor used by the Institute of Transportation Engineers (ITE) is 10 vehicular trips per weekday per single-family residence. Applying that rule of thumb (apparently the same one King County used) leads to a conclusion that Trail bicyclist volumes are most likely greater than vehicle volumes on the crossing streets in the area south of NE 165<sup>th</sup> Street.

One exception to this conclusion may exist: The NE 147<sup>th</sup> Street crossing connects to a through street southbound into Seattle. While there are only about 39 houses between that crossing and the nearest one to the south in Seattle, the record contains no evidence regarding how many vehicles actually use that crossing on a typical weekday. It may well be, as some witnesses argued, that residents in the area to the south find the NE 147<sup>th</sup> Street route to be desirable for certain eastbound trips.

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<sup>79</sup> Paragraph added at end of Conclusion after reconsideration.

- D.8. Volume alone cannot be the major consideration in determining priority at crossings, especially given the data in this record. The Trail use figures are based on three days in June. Whether those volumes are different in the winter is not known. It is entirely reasonable to expect that they are lower, by how much no one can say with any certainty.

Street crossing volumes were never measured. Calculation based on ITE rates is reasonable for those crossings where the number of “downstream” dwellings is fixed. Reliance on ITE rates is more problematic in those two locations where the number of downstream residences is variable: NE 147<sup>th</sup> Street (because it is a through street connecting to a large neighborhood to the south) and NE 165<sup>th</sup> Street (because it serves the Sheridan Beach neighborhood and, through it, provides access to the Lake Forest Park shopping center).

The number of vehicles which cross the Trail at those two locations is simply unknown given the record in this hearing. The volumes may equal Trail volumes, they may not. Of the two, NE 147<sup>th</sup> Street is of greater concern for two reasons: The Trail crossing at NE 165<sup>th</sup> Street will be controlled by STOP signs; and the geometry at the NE 147<sup>th</sup> Street crossing is far more substandard.

- D.9. Traffic control decisions are the result of the interplay of standards, engineering judgment, and local policy. We are all familiar with all-way STOP controlled intersections which do not seem to be justified by either traffic volume or the physical characteristics of the intersection. The STOP signs on the Cedar River Trail at side streets and driveways represent a very different philosophy than that being urged here – and that trail’s environment is far more rural and far less congested than is the south half of the Burke-Gilman Trail. In fact, one need look no further than the NE 165<sup>th</sup> Street crossing to find a situation where policy has had as large an effect on traffic controls as has pure engineering opinion.

- D.10.<sup>80</sup> It could be argued that the vehicle approaching the intersection which has the poorest visibility of the entire intersection might be the one which should stop or yield before crossing. Under that line of reasoning, motorists would be the ones to stop. But even if they stopped, they would still not be able to clearly see the entire intersection at many of these crossings. For many of the crossings, especially when approaching from the east, the motorist would still be entering the intersection somewhat blind.

As discussed in Conclusion of Law D.3, above, special treatment of Crossings 1 – 8 is necessary because of the lack of appropriate ESD for the street/driveway crossings. (It matters not whether they are streets or driveways: Motorists on them simply can’t see far enough down the Trail to make a safe decision to cross.)

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<sup>80</sup> Conclusion revised after reconsideration.

Trail users, on the other hand, will have a clear view of all approaches at every intersection. They are traveling on a nearly flat gradient and the vegetation will have been cut back to provide clear lines of sight. The trail user, then, is the one who can clearly see potential trouble and avoid it.

Given the relatively low reported traffic volumes that occur at the crossings south of NE 165<sup>th</sup> Street, requiring Trail users to come to a full stop seems unnecessary. However, the obstructed view street crossings should have priority as they cannot see what they need to avoid; the Trail users need to yield to crossing traffic for maximum safety.

- D.11.<sup>81</sup> MUTCD § 2B.09 contains support for this approach: Trail users' ability to see all potentially conflicting traffic and safely stop or pass through the crossing when traveling at the 85<sup>th</sup> percentile speed fits Condition A; the special geometric problems meet Condition D. Use of the YIELD sign at these locations is also consistent with MUTCD § 9B.03, Standard 2.

The Examiner fully understands that the MUTCD also indicates that relative speed, volume, and importance of each route at a crossing are factors to be considered when assigning priorities. [MUTCD § 9B.03, p. 9B-2, ¶¶ 1 – 3] This just goes to show that the MUTCD is not a rigid document mandating a fixed set of answers no matter the local conditions.

After carefully weighing all the testimony and evidence, it is the Examiner's considered judgment that the safest system, when the present speed-reducing constraints have been removed as proposed, will be for Trail traffic to YIELD to crossing traffic. The City's signage concept presented during the reconsideration process (Exhibit 153, pp. 18 – 21 and 25) is reasonable, is consistent with the MUTCD, and will adequately provide for user safety. If that plan is employed, the Examiner now agrees with King County, the City, Wagar, and CBC that the speed limit need not be reduced in the area of Crossings 1 – 8.

- D.12.<sup>82</sup> Conditions which alter crossing priority will not render the proposal impracticable. Such conditions will not thwart the project's purpose (unless that purpose were to construct a trail that would encourage users to break King County Code speed restrictions). They might slow down some users for a matter of a few seconds, but that would be the only effect, and that does not render the project impracticable. On the other hand, a condition which required grade-separated crossings would most likely make the project impracticable as there simply is not enough room at most, if not all, of the crossings to construct grade-separation structures. That type of condition could not be imposed.

E. Vegetation Removal

- E.1. The Trail redevelopment project, like any other activity in the City, is subject to the tree removal and protection requirements of Chapter 16.14 LFPMP. A Level II Tree Removal Permit does not have to

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<sup>81</sup> Revisions to paragraphs 1 (minor) and 3 after reconsideration.

<sup>82</sup> Revised after reconsideration.

be issued before a CUP, PAUE, or SSDP is issued. In fact, common sense suggests that such a permit is very much akin to a building permit in that it deals with very specific development plans. Building permits are typically issued after land use entitlements have been issued. Timing of issuance of a tree removal permit should be no different.

- E.2. During review of a land use entitlement application such as a CUP or SSDP, the Examiner needs evidence that the proposal can comply with Chapter 16.14 LFPMP given the site development plan then under consideration. But the Examiner is not the decision maker for Level II Tree Removal Permits and, therefore, need not make the specific decisions which administrative staff will have to make at a later date.
- E.3. The evidence in this record adequately demonstrates that King County will be able to meet the requirements of Chapter 16.14 LFPMP. The dispute over the exact number of trees that will have to be removed is irrelevant: King County will have to comply with Chapter 16.14 LFPMP just like every other landowner in the City; those regulations will control how many trees are removed and with what they are replaced.
- F. Wetlands and Streams
  - F.1. The citizens' wetland delineation challenge is neither persuasive nor timely. Their anecdotal pictures of mud do not meet the three factor methodology for wetland delineation. If citizens wanted to challenge the delineation of wetlands, they had to do so through an appeal of the FEIS. Since that was not done, a challenge now is untimely.
  - F.2. The proposed mitigation is appropriate, subject to issuance of the required SAWP and the PAUE which is part of this proceeding.
- G. Trail Amenities
  - G.1. The proposed trail amenities changes will not measurably alter the Trail's impact as it passes through Lake Forest Park. Further analysis is not warranted.
- H. PAUE Analysis
  - H.1. King County needs a PAUE for Lyon Creek stream buffer reduction below the established minimum and for surfacing an otherwise allowed trail with impervious materials. The following analysis evaluates those two items against the criteria set forth at LFPMP 16.16.260(C), quoted above.
  - H.2. The proposal meets PAUE Criterion (C)(1). The FEIS's "rebuild" alternative is not an option which can be considered. King County officially chose the redevelopment option at the end of the FEIS process. Under *Des Moines*, the alternative consideration process is long over.

No practical way exists to create a larger buffer between Lyon Creek and the Trail. The relationship between the Creek and the railbed existed long before the railbed was converted into the Trail. Bothell Way, which closely borders the north side of the Trail in that area and which is also within

the currently required stream buffer, prevents any Trail shift away from Lyon Creek. No alternative exists.

While some may argue that pervious pavement would be practical (more expensive, but practical), it would not result in any lesser impact to sensitive areas because the underlying railbed is impervious. As an alternative, therefore, it would provide no benefit. It is not an alternative with lesser impact.

H.3. PAUE Criterion (C)(2) is not applicable. This criterion applies to the provision of “utility services to the public”. The PAUE process covers development proposals made by two groups: Public agencies and public utilities. While public utilities are typically operated by public agencies, not all public agency projects are public utilities. Criterion (C)(2) expressly applies only to public utility projects. It has no applicability to any other type of project sponsored by public agencies. The Trail is not a public utility; its redevelopment is not a public utility project.

H.4. The proposal meets PAUE Criterion (C)(3). Leaving the Trail as close to Lyon Creek as it has been for the past 30+ years will not pose “an unreasonable threat” to the public. Substantial quantities of a wide variety of shrubs are to be planted between the Trail and Lyon Creek where they parallel one another. (Exhibit 32, Sheet W3.7) If anything, those plantings will enhance the vegetated barrier between Trail users and the Creek.

While some may argue that pervious pavement would be practical (more expensive, but practical), its absence would not create any threat to public health, safety, or welfare.

H.5. The proposal meets PAUE Criterion (C)(4). The substantial quantities of a wide variety of shrubs to be planted between the Trail and Lyon Creek where they parallel one another will serve to improve the functions and values of the buffer that exists.

While some may argue that pervious pavement would be practical (more expensive, but practical), its absence would not result in any loss of critical area functions and values: Even with pervious pavement, runoff would quickly encounter the impervious railbed beneath the pavement. The ultimate movement of runoff would not be markedly different.

H.6. The proposal meets PAUE Criterion (C)(5). All evidence shows that, properly conditioned, the Trail redevelopment will comply with other applicable regulations and standards.

H.7. The Trail redevelopment proposal meets all applicable PAUE criteria. The requested PAUE should issue subject to appropriate conditions.

I. CUP Analysis

I.1. King County needs a CUP for Trail redevelopment. The following analysis evaluates the proposal against the criteria set forth at LFPMP 16.54.030, quoted above.

- I.2. The proposal meets CUP Criterion (A). Planning has provided in Exhibit 57 an extensive analysis of applicable Comprehensive Plan goals and policies. (Exhibit 57, pp. 8 – 10) Planning concludes that, properly conditioned, the proposal is consistent with them all. (*Id.*) No hearing participant challenged any aspect of Planning’s analysis or its ultimate conclusion. The Examiner finds that analysis and conclusion persuasive.
- I.3.<sup>83</sup> The proposal meets CUP Criterion (B) if properly conditioned. Planning’s analysis of this criterion focuses on two central issues: The Trail crossings and drainage. The Examiner agrees that those are the two most critical aspects of this criterion in so far as this proposal is concerned.

Trail crossings have been discussed in length in Conclusions of Law, Section D, above. That discussion need not be repeated. In summary, for the redevelopment proposal not to be detrimental to the neighborhood through which it passes, Trail traffic must yield to crossing traffic. Because of the presumably relatively low volumes, the Examiner does not conclude that Trail traffic must stop at every crossing. YIELD control will serve to put Trail users on notice that they must be aware of crossing traffic and give it the right of way when encountered.

The half mile (plus or minus) between Sta. 7+50 (just south of the NE 147<sup>th</sup> Street crossing) and Sta. 35+50 (just north of the NE 157<sup>th</sup> Street crossing) is highly congested, much more so than any other segment of the Trail through Lake Forest Park. That segment has eight awkward trail crossings. The distances between the crossings are irregular; the configurations of the crossings vary widely. Nothing in the proposal will (or realistically could) change those facts. (The redevelopment will improve SSD for Trail users at all crossings, but that will not change the geometrics.) If the Trail is controlled by YIELD signs at the crossings in that area, public safety will be protected and adjacent properties will not be harmed.

The preponderance of the evidence indicates that drainage facilities for the proposed Trail redevelopment have been designed in accordance with the 2005 Design Manual. The compromise condition agreed to by King County and the City actually goes beyond what could be required under the 2005 Design Manual. The Examiner is not persuaded that the proposal will create drainage problems downslope. (As previously noted, the cross-slope change will reduce flows in the ditch system, which will reduce flows through the various down-slope conveyance systems.) However, as previously noted, to the extent that the redevelopment alters any of the runoff control features at any of the crossings, King County must install compliant control features as part of its project.

- I.4. The proposal meets CUP Criterion (C). The Trail is heavily used, by both City residents and non-residents alike. It definitely provides a beneficial and appreciated service.

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<sup>83</sup> Conclusion revised after reconsideration.



- I.5. The proposal meets CUP Criterion (D) if properly conditioned. The Trail redevelopment proposal will widen but not markedly alter the visual character of the Trail. Application of Chapter 16.14 LFPMC will provide adequately for tree preservation/replacement; the proposed planting plans will adequately replace vegetation removed to improve sight distance at crossings.
- I.6. The proposal meets CUP Criterion (E) if properly conditioned. The Trail corridor is constrained by the original width of the railbed, the major steep slopes to its west, and the steep slopes (of lesser height) to its east. King County has attempted to reduce the impact of trail widening by minimizing any cutting into the western slopes. Given the physical constraints, the design will not seriously alter the area's physical characteristics.
- I.7. The proposal meets CUP Criterion (F). This criterion addresses zoning variances. King County has not sought any zoning variances in conjunction with the Trail redevelopment proposal. Since no zoning variances have been sought, the criterion is effectively moot.
- I.8. The proposal meets CUP Criterion (G) if properly conditioned. This criterion includes a substantial overlap with Criterion (B). The County has submitted both law enforcement and maintenance plans. (Exhibits 17 and 16, respectively) Conditioned to require implementation of those plans, the proposal complies with this criterion.
- I.9.<sup>84</sup> The proposal meets CUP Criterion (H) if properly conditioned. The Examiner has already discussed the subject matter of this criterion in Conclusion of Law I.3, above. That discussion is incorporated herein and will not be repeated.

For the purposes of this criterion, it matters not whether Trail crossings are public streets or private drives. This criterion addresses the safety of both pedestrian and vehicular (including bicycle) users of the Trail and all its crossings. Since ESD cannot be met on Crossings 1 – 8, but SSD can be met on the Trail, common sense, supported by the MUTCD, holds that Trail users must yield to crossing traffic.<sup>85</sup> The low volumes of crossing traffic, especially at Crossings 1 – 8, allow YIELD controls to be employed instead of STOP controls. With the Trail yielding to crossing traffic, this criterion is met; without the Trail yielding to crossing traffic, the criterion would not be met.

- I.10. The proposal meets CUP Criterion (I). Potentially impacted public services include police, fire, street maintenance, and stormwater. Compliance with conditions related to law enforcement, maintenance, and drainage, discussed previously under other conditional use criteria, will provide compliance with this criterion.

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<sup>84</sup> Second paragraph added after reconsideration.

<sup>85</sup> The Trail is not a crosswalk where it crosses the streets/driveways, it is a roadway. Therefore, traffic on the Trail is not using a crosswalk when crossing the streets/driveways, it is using a roadway. The requirement that vehicles must stop for people in a crosswalk simply does not apply in this situation. (In fact, Trail users would be obligated to stop for pedestrians crossing the Trail along the edge of the street crossings as crosswalks are implied by law in those areas.)

- I.11. The proposal meets CUP Criterion (J). King County has obtained permits for previous construction in the City of Lake Forest Park. City staff is not aware of any violations. (Exhibit 57, p. 22, Criterion J analysis)
- I.12. Section 18.54.047 LFPMC, quoted in the Legal Framework: Review Criteria section, above, does not establish any CUP review criteria. Rather, it summarizes conditioning authority and scope. The Examiner will impose conditions specifying which plans have been approved; those conditions will fulfill the requirement to condition the proposal regarding “limitation of size, location on property and screening”. The remainder of the subsection does not add any additional conditioning requirements.
- J. SSDP Analysis
  - J.1. The SSDP has raised no issues during the hearing process. The SSDP is required because much of the Trail lies within 200 feet of Lake Washington – as it has for the last 30+ years since its original construction.
  - J.2. Planning has provided an analysis of SSDP criteria compliance in Exhibit 59. That analysis, having not been challenged by any hearing participant, is incorporated by reference as if set forth in full.
  - J.3. Neither “implied” SSDP condition need be imposed. (See Finding of Fact H.4, Footnote 40, above. A land use entitlement need not list as a condition acquisition of a code-mandated construction-level permit. A “Land Clearing, Grading, and Excavation Permit” is just such a construction-level permit. No reference to it is necessary.

The U.S. Army Corps of Engineers has issued the required Nationwide Permit, thus fulfilling the second “implied” condition. A condition which has been fulfilled before permit issuance need not be listed on the permit as something to be fulfilled.

- K. Conditions Analysis
  - K.1. Planning has provided three separate sets of recommended conditions, one for each of the requested permits. (Exhibits 57 – 59) The Examiner believes that because such a high degree of overlap and interdependence exists among the three permits, a consolidated listing of permit conditions is appropriate.
  - K.2. Permit conditions need to be sufficiently specific that if all of the principles who have been involved in the review process were to be unavailable, their successors would be able to tell from the conditions exactly what had been approved and under what conditions.
  - K.3. None of the sets of recommended conditions list any approved plans. A CUP, PAUE, and SSDP embody the concept of approval of a specific development proposal. Evaluation of each is based upon the specific development plans submitted by the applicant. It is appropriate, therefore, that the

conditions of approval clearly identify the plans which are being approved. That is especially true where, as here, multiple versions of some plans exist in the record.

Exhibit 6 is the only full set of plans in the record. Portions of Exhibit 6, however, have been superseded by subsequently prepared materials. King County submitted a list of plans and updates (Exhibit 128K-1) which is only somewhat helpful: It lists apparently updated plan sets for planting and demolition which King County did not enter into the record. The Examiner cannot consider or approve plans which are not presented for review during the hearing process.

Based upon the evidence in the record, the Examiner concludes that the following list is the current project plans set:<sup>86</sup>

Exhibit No.	Title	Sheet Numbers	Exceptions
6	Plan Set	K1.0 – E8	All “W” series sheets
15	Sign Layout Plan	SL1.0 – SL1.9	Exhibit 38 and as specified in the conditions
25	Sensitive/Hazard Areas	SH1.0 – SH1.9	
32	Sensitive Area Exhibits	W1.0 – W4.3	
131	Vegetated Flow Path	E3.0 – E3.3	

Reference to those exhibits will be incorporated into a new condition.

- K.4. Most of the recommended PAUE conditions merely recite the type of approval granted and state that approval is “subject to implementation of applicant provided mitigation plans.” Others merely require compliance with Recommended CUP Condition 2 as revised by Exhibit 116. (Exhibit 117) If the consolidated permit lists all approved plan sets and includes Recommended CUP Condition 2 as revised by Exhibit 116, all of those recommended conditions would become effectively moot.

While it could be argued (no one has as yet done so) that compromise Recommended PAUE Condition SA-1 is more appropriately imposed as a condition on the SAWP rather than the PAUE, so much effort, negotiation, and compromise went into the crafting of it that the Examiner believes it best to include it in this consolidated permit. Inclusion here will obviate any further conflict over its subject matter.

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<sup>86</sup> Exhibit 128K-1 indicates that Exhibit 8 contains sheets numbered “L3.0-L3.10,” and that it was updated by a submittal made on “1/23/2008” which has no exhibit number. Exhibit 8 as provided to the Examiner consists of only one sheet, not 11 sheets, was submitted to the City on October 1, 2008, not January 23, 2008, and is identically the same as Sheet L3.10 in Exhibit 6. Given those facts, the Examiner concludes that Exhibit 8 is not a new or updated plan sheet.

The Examiner has omitted Exhibit 27, Existing Conditions Plan, from the listing: Although very valuable throughout this review process, existing conditions do not depict that for which permits have been issued.

In doing so, the Examiner will make one substantive change: The number of trees that may be removed will be eliminated. Chapter 16.14 LFPMP, as has been noted above, adequately regulates the number of trees that may be removed from any development site and specifies how their removal is to be compensated. Since a Level II Tree Removal Permit has already been applied for, that administrative permit should be the vehicle for determining limits on tree removal, just as the adopted code intends it to be.

The remainder of the condition is appropriate. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended PAUE Condition 1 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.

K.5.<sup>87</sup> The recommended conditions of CUP approval as set forth in Exhibit 116 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:

- A. All references to the source of each condition (the “From staff report page ...” provisions) will be eliminated.
- B. Recommended CUP Condition 3 will be substantially revised to more clearly indicate that its provisions apply only where an existing drainage control is altered or affected by the Trail redevelopment.
- C. Recommended CUP Condition 5 will be substantially revised: The first half of the condition will be changed to require issuance of a Level II Tree removal Permit prior to any tree removal; the second half will simply be eliminated. It is unnecessary to require submittal of a tree replacement plan as that is a requirement of a Level II Tree Removal Permit; it is unnecessary to refer to a required PAUE as a PAUE is part of the consolidated permit being issued. All reference to the Level II Tree Removal Permit could probably be eliminated (as it is required by code), but the Examiner elects to leave what essentially serves as a “reminder” because of the significant interest in this topic.
- D. Recommended CUP Condition 6 will be eliminated: It is unnecessary to refer to a required PAUE as a PAUE is part of the consolidated permit being issued.
- E. Recommended CUP Condition 9 will be eliminated. No need exists for further crossing studies. The preponderance of the evidence is sufficient to allow the Examiner to set reasonable, practical conditions which will better assure safety of everyone crossing or using the Trail.

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<sup>87</sup> Revised after reconsideration: New paragraph added as K.5.B; original K.5.G and K.5.I deleted; paragraph added to K.5.H.

- F. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended CUP Conditions 1, 2, 4, 8, and 10 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
- G. The hearing included some discussion of the nature of the retaining walls that will be added along the Trail. Those walls could create an eyesore which would detract from the proposal's compliance with CUP Criteria (B), (D), and (E). Were King County to use "Ecology Blocks" or something similar to construct these walls, their blank character would not be in keeping with the neighborhood. This topic was briefly discussed during the hearing, at which time King County stated that it intended to use gabions for the retaining walls. Gabion walls would be quite acceptable as their irregular surfaces would better blend into the surroundings and the possibility of vegetation growing out of them would exist. A condition will be added to require that all new retaining walls be constructed using gabions or an equivalent providing variety and visual interest.
- H. A condition will be added for the reasons set forth above requiring that the traffic control plan between Sta. 0+00 and approximately 35+50 (the NE 157<sup>th</sup> Street crossing) be revised such that Trail approaches to all crossings within that segment be YIELD sign controlled with the street/driveway crossings posted with bicycle crossing warning signs.

If a traffic control plan consistent with that described in Exhibit 153 is employed, the "warning bands" would not be necessary. The Examiner will allow King County to eliminate them if it so desires.

- K.6. The above-discussed conditions are, generally speaking, appropriately applied to the SSDP also. Section 173-27-190 WAC contains certain content and format requirements for any SSDP which is issued:

(1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).

(2) Permits for substantial development, conditional use, or variance may be in any form prescribed and used by local government including a combined permit application form. Such forms will be supplied by local government.

(3) A permit data sheet shall be submitted to the department with each shoreline permit. The permit data sheet form shall be as provided in Appendix A of this regulation.

Subsection (2) allows this Decision to serve as the SSDP. Subsection (1) requires that an additional condition be added. The data sheet required by Subsection (3) will be prepared by Planning when it transmits the SSDP and supporting exhibits to the state as required by Chapter 90.58 RCW.

## DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner hereby:

- A. **REMANDS** to the Planning Department for its consideration and action in the context of a Sensitive Areas Work Permit all those issues which have been eliminated from the requested PAUE pursuant to Conclusions of Law Section A, above.
- B. **GRANTS** the Conditional Use Permit application for redevelopment of the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park under file number CU07-01 **SUBJECT TO THE ATTACHED CONDITIONS.**
- C. **GRANTS** a Public Agency and Utility Exception for stream buffer reduction below established minima and for use of impervious pavement on an otherwise permissible public trail associated with redevelopment of the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park under file number SA07-162 **SUBJECT TO THE ATTACHED CONDITIONS.**
- D. **GRANTS** the Substantial Development Permit application for redevelopment of the 2.3 mile segment of the Burke-Gilman Trail which passes through Lake Forest Park under file number SSD07-04 **SUBJECT TO THE ATTACHED CONDITIONS.**

Revised Decision issued April 8, 2009.<sup>88</sup>

\s\ John E. Galt (Signed original in official file)

John E. Galt  
Hearing Examiner

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<sup>88</sup> Line revised after reconsideration.

**NOTICE OF RIGHT OF APPEAL**  
**CONDITIONAL USE PERMIT and PUBLIC AGENCY AND UTILITY EXCEPTION**

The portion of this final Decision regarding the Conditional Use Permit and Public Agency and Utility Exception may be reviewed in Superior Court pursuant to the procedures established by Chapter 36.70C RCW, the Land Use Petition Act. Section 36.70C.040 RCW requires that any appeal be properly filed with the Court within 21 days of the issuance of the final City Decision. Please refer to Chapter 36.70C RCW for further guidance regarding judicial appeal procedures.

**NOTICE OF RIGHT OF APPEAL**  
**SUBSTANTIAL DEVELOPMENT PERMIT**

The portion of this final Decision regarding the Substantial Development Permit may be appealed to the State Shorelines Hearings Board pursuant to the procedures established by Chapter 90.58 RCW, the Shoreline Management Act of 1971. Please refer to Chapter 90.58 RCW and Washington Administrative Code regulations adopted pursuant thereto for further guidance regarding Hearings Board appeal procedures.

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”
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**CONDITIONS OF APPROVAL**  
**CU07-01, SA07-162, & SSD07-04**  
**King County Burke-Gilman Trail Redevelopment**

This consolidated Conditional Use Permit, Public Agency and Utility Exception, and Shoreline Substantial Development Permit is subject to compliance with all applicable provisions, requirements, and standards of the Lake Forest Park Municipal Code, standards adopted pursuant thereto, and the following special conditions which apply equally to each permit unless expressly stated otherwise within the conditions:

- 1.<sup>89</sup> The project approved under these permits is that depicted on the following plans, all of which are herewith approved (subject to any exceptions noted in the following table):

Exhibit No.	Title	Sheet Numbers	Exceptions
6	Plan Set	K1.0 – E8	All “W” series sheets and as specified in the conditions
15	Sign Layout Plan	SL1.0 – SL1.9	Exhibit 38 and as specified in the conditions
25	Sensitive/Hazard Areas	SH1.0 – SH1.9	
32	Sensitive Area Exhibits	W1.0 – W4.3	
131	Vegetated Flow Path	E3.0 – E3.3	

2. Trail redevelopment shall maintain vehicular and pedestrian access to adjacent properties at levels similar to current access.
3. The Permittee shall either:
- Change the trail’s cross slope to the west between Stations 0+00 and 11+50 and between Stations 17+00 and 33+00 such that the trail’s drainage will be collected and conveyed in the ditch system, following documentation by the County that the ditch system has sufficient capacity to accommodate such drainage; or
  - Conduct a Level 2 downstream analysis, as defined by the KCSWDM and subject to the City’s review and approval, of sheet flow from the trail between Stations 0+00 and 11+50 and between Stations 17+00 and 33+00. The City staff, consultants, or both, shall participate in the field work for the Level 2 analysis to the extent permitted by City funding. If the Level 2 analysis indicates that sheet flow from the trail over these sections is likely to aggravate an existing drainage problem or create a new one, then the Permittee, subject to the City’s

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<sup>89</sup> Exhibit 6 “Exceptions” cell revised after reconsideration.



review and approval, shall identify reasonable solutions consistent with the KCSWDM and implement them as part of trail construction.

The City and the County agree to use best efforts to resolve any disagreements concerning the downstream analysis in good faith.

- 4.<sup>90</sup> Drainage from those intersections with roads and driveways where either the Trail presently slopes towards the west or where the Trail reconstruction will alter or remove any existing sheet flow drainage control device shall be handled with trench drains, or other control mechanisms acceptable to the City, on the west side of the trail to collect and convey surface water to the existing conveyance systems; no berms may be used to direct sheet flow.
5. Update the demolition plans to show limits of disturbance.
6. King County shall provide on-going law enforcement to maintain safety of all users and maintain user conduct on the Burke-Gilman Trail in accordance with King County Code Title 7. Enforcement of King County Code Title 7 shall be provided for offenses such as:
  - a. Travel in excess of the 15 mph (or 10 mph where posted as such) speed limit
  - b. Potentially negligent travel
  - c. Inattention to traffic control devices
  - d. Motorized travel
  - e. Passing inappropriately
  - f. Pets of leash
  - g. Straying from the trail
  - h. Not respecting the rights of others using the trail.
7. All vegetation shown on Burke-Gilman Trail Redevelopment Project, Permit Set, October 5, 2007 Sheets L3.0 through L3.10 (Exhibit 6) shall be monitored and maintained by the Permittee in accordance with LFPMC 18.62.070 except where more stringent maintenance and monitoring is required by Chapter 16 LFPMC. King County shall provide on-going maintenance to maintain safety of users and appearance of the trail, including but not limited to the following:
  - a. A weed and litter free condition in areas designated for maintained landscaping, such as site triangles, plazas, lawn areas, and seating areas that require regular maintenance;
  - b. mowing program for designated areas such as steep slopes;
  - c. pruning of hazard trees;
  - d. clean traffic control signage and clean trail surface.
  - e. replacement of dead or dying plant material.

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<sup>90</sup> Revised after reconsideration.

8. Stop signs for both trail users and vehicles shall be provided at NE 165th Street near Beach Drive.
- 9.<sup>91</sup> The “warning bands” depicted within Exhibit 6 may be omitted at the permittee’s option provided “YIELD lines” are employed as specified below..
- 10.<sup>92</sup> The traffic control plan (Exhibit 15) between Stations 0+00 and approximately 35+50 (the NE 157<sup>th</sup> Street crossing) shall be revised such that trail approaches to all crossings within that segment are YIELD sign controlled with the street/driveway crossings posted with bicycle crossing warning signs. The traffic control plan for this area shall include, but need not be limited to, the following components:
  - A. YIELD AHEAD signs (MUTCD W3-2) northbound for Crossings 1, 2, 3, 4, and 8 and southbound for Crossings 8, 7, 3, 2, and 1.
  - B. YIELD signs (MUTCD R1-2) at Crossings 1 – 8.
  - C. YIELD lines (MUTCD Figures 3B-14 and 3B-15) shall be employed in lieu of the proposed “warning bands”.
  - D. An appropriate advisory sign (such as MULTIPLE CROSSINGS NEXT 0.6 MILES or CONGESTED AREA NEXT 0.6 MILES) shall be placed at about Station 6+00 for northbound travel and at about Station 37+25 for southbound travel.
  - E. TRAIL AHEAD or BIKE CROSSING warning signs (MUTCD W11-1) at all driveway and street approaches. An advisory speed plaque 5 MPH shall be mounted to these warning signs if deemed appropriate by the City Engineer.
- 11.<sup>93</sup> King County, in consultation with and subject to approval by the Lake Forest Park City Engineer, shall revise Exhibit 15, Sign Layout Plan, to be consistent with both the above conditions and the MUTCD.
12. All new retaining walls shall be constructed using gabions or an equivalent providing variety and visual interest.
13. Tree removal in steep slope hazard areas is subject to the following requirements in addition to any requirements imposed pursuant to a Sensitive Areas Work Permit:

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<sup>91</sup> Original Condition 9 deleted, replacement Condition 9 added after reconsideration.

<sup>92</sup> Condition revised after reconsideration.

<sup>93</sup> Original Condition 11 deleted; subsequent conditions renumbered.

- a. After permits for work in steep slope hazard areas have been issued and the limits of construction have been staked or otherwise marked on the site, but before the Permittee undertakes any ground-disturbing activities, a geotechnical expert shall visit the steep slope hazard areas of the site, examine existing conditions, and prepare a supplemental report to provide direction on how trees may be removed from those areas without compromising slope stability.
  - b. Once the City and the Permittee jointly verify in the field the location of all trees to be removed or that may be affected by the proposal (See Condition 14.d, below), the Permittee shall hand-draw on the existing planting plan the location of all significant trees that will be removed or may be affected by the proposed work. All replacement trees will be hand-drawn on the existing plan to the extent they are not already shown. The City agrees that once the plan is updated consistent with this subsection (b), the existing planting plan will meet the requirements of LFPMC 16.16.230(G)(1)(d). Trees removed from sensitive areas shall be replaced with native species at a ratio of at least 1:1.
  - c. The mitigation for impacts in wetlands and wetland buffers, as indicated in the Sensitive Areas Plan, shall meet the mitigation requires outlined in LFPMC 16.16.340 to achieve no net loss of habitat from tree removal. The City acknowledges that the Permittee does not propose to remove any trees from any wetlands.
  - d. Prior to issuance of any construction permits for the proposal, the City and the Permittee will jointly verify in the field the locations of all trees to be removed and all trees to remain that may be affected by trail construction. The County shall update its existing planting plan by hand-drawing the location of such trees as required under Condition 14.b, above. After construction permits have been issued and the limits of construction have been staked or otherwise marked on the site, but before the Permittee begins any ground-disturbing activities on the site, the Permittee shall have a certified arborist walk the site to evaluate the anticipated effect of proposed construction on the viability of significant trees on and off the site. The arborist shall prepare a supplemental report that shall identify significant trees to remain that may be affected by constructed elements such as walls and grading. The report shall indicate whether project construction will affect significant trees to remain on and off the project site in a manner that could negatively affect health, safety, and welfare, and shall propose measures that the County will implement to mitigate such effects. If necessary, the report shall also update the number of significant trees to be removed.
14. Construction pursuant to this Shoreline Management Act permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).